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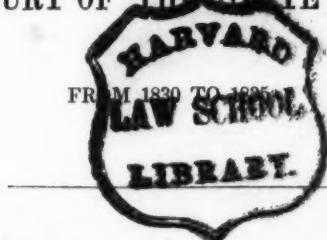
REPORTS

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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF THE STATE OF MISSOURI,



Published in compliance with the Act of the General Assembly of the State of Missouri, entitled "An Act to provide for the Publication and Distribution of the Decisions of the Supreme Court of this State," Approved January 1, 1827.

BY JOHN C. EDWARDS, SECRETARY OF STATE.

Re-published in compliance with the Act of the General Assembly of the State of Missouri, entitled "An Act to Re-publish the first three volumes of the Decisions of the Supreme Court," Approved February 17, 1843.

BY S. M. BAY, ATTORNEY GENERAL.

VOL. III.

SAIN T LOUIS:

CHAMBERS & KNAPP, 45 MAIN STREET.

1843.



Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, SEPTEMBER TERM, 1829.

TRACY & WAHRENDORFF v. THE STATE.

1. The act imposing a tax on venders of merchandise and pedlers, passed 1825, and the supplement thereto, passed 1829, are constitutional, so far as they apply to retailers.
2. In an indictment under the act to impose a tax on venders of merchandise, it is not necessary to charge that the articles were sold by retail. The defendant should move the Court to exclude all evidence of such sales as he might lawfully make.

ERROR from the St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This is a writ of error to a judgment of the Circuit Court of St. Louis county, on an indictment found in that Court against the plaintiffs in error, for violating the provisions of two acts of the General Assembly. The indictment was founded on the second section of an act passed the 1st March, 1825, imposing a tax on licenses to venders of merchandise and pedlers, (*Revised Code*, p. 531,) and on the first section of an act to amend the same, passed 22d January, 1829, p. 38-9 of the acts at the first session of the fifth General Assembly; by which two laws it is provided that all merchants shall pay a tax of one-fourth of one per centum on their whole stock in trade, except such goods as are the growth, produce or manufacture of this State; and that before any person, &c., shall receive a license to vend merchandise, he, &c., shall deliver to the collector of the proper county a complete statement in writing of all the goods, wares and merchandise (except as aforesaid) received at his store, &c., for the last six months next preceding the application for such license, to be sold on

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his account, or on the account of any other person, and that such account shall be sworn to.

(4) The indictment charged that the plaintiffs in error, defendants below, did deal as venders of merchandise not having a license therefor, &c. They pleaded not guilty, and the jury found specially that the said Edward Tracy and Charles Wahrendorff are now and have been merchants, and doing business as merchants in the town of St. Louis, in Missouri, at about the same stand in said town for ten years last past, and during that time they have dealt in buying and selling goods of foreign growth, produce and manufacture, as well as goods which are the growth, produce and manufacture of several of the States of the United States. The course of business of said Tracy & Wahrendorff has been to purchase in Philadelphia and Pittsburgh, in the State of Pennsylvania, and New York, in the State of New York ; in New Orleans, in the State of Louisiana ; in Galena, in the State of Illinois ; in Cincinnati, in the State of Ohio, and Louisville, in the State of Kentucky, such goods of the growth, produce and manufacture of the different States of the United States, other than Missouri, and of foreign countries, as were calculated for the Missouri market, and to bring the same goods to their store in St. Louis aforesaid, where the same were sold out at wholesale and retail ; the goods received by said Tracy & Wahrendorff at their said storehouse in St. Louis aforesaid, during the six months preceding the fifteenth day of March, in the year of our Lord one thousand eight hundred and twenty-nine, (down to which time the said Tracy & Wahrendorff had regular licenses as merchants,) to be sold on their account, and on account of other persons, were altogether of the growth, produce and manufacture of foreign countries, and of the States of the United States, other than Missouri, and were put up in bales and boxes in Philadelphia, New York and New Orleans aforesaid, and forwarded and arrived in the same bales and boxes at the store of said Tracy & Wahrendorff in St. Louis aforesaid, and there received by them. The introduction into Missouri of goods, wares and merchandise, of the growth, produce and manufacture of other States of the United States, and of foreign countries, is entirely in the hands of merchants. A large amount of such goods, wares and merchandise, is now sold and used in Missouri, and has been annually consumed there for many years past. Those persons who import into Missouri, goods, wares and merchandise, as aforesaid, so import them for the purpose of again selling them, and do sell them out in Missouri, sometimes in the same bales, barrels, &c., and in the same shape in which they receive them. Of the goods received and sold by the said Tracy and Wahrendorff, within the next six months preceding the 15th day of March last past, a portion, to wit : fifty barrels of flour, produced and manufactured in the State of Ohio ; fifty barrels of whisky, produced and manufactured in the State of Kentucky ; one hundred kegs of nails, from the State of New York ; twenty boxes of glass, manufactured in said Pittsburg, were received and sold by them at their said store in St. Louis aforesaid, and taken away from there, in the same barrels, kegs and boxes respectively, in which they had been received there, and in which they had been forwarded from said New York, Philadelphia, Pittsburgh, and Louisville and Cincinnati, without having been opened. The said Tracy and Wahrendorff on the fifteenth day of March, in the year eighteen hundred and twenty-nine, and from thence, until the finding of the indictment in this case, did deal in the selling of goods, wares and merchandise, the growth, produce and manufacture of foreign nations, and of the several States of the United States, other than Missouri, at their store in the said city, occupied for that purpose ; and

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that the said Tracy & Wahrendorff, during the time aforesaid, at the place aforesaid, did sell by retail, in great and in small quantities, the said goods, wares and merchandise, which were opened at their said store and offered to be sold in said quantities ; and that during all the time aforesaid the said Tracy & Wahrendorff had no license as vendors of merchandise under the statutes of Missouri ; but that on said fifteenth day of March, in said year eighteen hundred and twenty-nine, said Tracy & Wahrendorff did apply to John C. Sullivan, the collector of the State and county revenue for (6) said county of St. Louis, for a license to be granted to them, said Tracy & Wahrendorff, as vendors of merchandise, and did then and there tender to said collector the sum of fifteen dollars as a tax upon said license for the ensuing six months, and the fee of the clerk, and then and there demanded said license, but that said collector then and there refused to grant the same, on the sole ground that said Tracy & Wahrendorff refused to pay to said collector the further sum of twenty-five cents on each hundred dollars of the value of all goods, wares and merchandise, excepting such as were the growth, produce and manufacture of the State of Missouri, received by them at their said store for the last six months next preceding the said fifteenth day of March, eighteen hundred and twenty-nine, to be sold on their account and on account of other persons.

On this finding the Circuit Court gave judgment for the State. The defendants moved in arrest of judgment on account of the insufficiency of the indictment, and this motion was overruled.

The plaintiffs in error contend that the judgment ought to have been arrested : because the indictment is defective and bad in this ; that the act of which it complains is not of course criminal ; that dealing as vendors of merchandise may or may not be illegal, according to the mode in which it is done. The provisions affecting this question found in revised code, p. 531, and the acts of 1828, pp. 38-9, it is contended, are repugnant to the 8th section of the first article of the Constitution of the United States, authorizing Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, and to the tenth section of the same article, prohibiting the States from laying any imposts or duties on imports or exports.

In *Brown v. the State of Maryland*, 12 *Wheaton* 419, the Supreme Court of the United States decided that a law of that State requiring importers to pay fifty dollars for license to sell goods in the same condition in which they were imported, that is, in the same box, bale or package, is unconstitutional, because repugnant to the two (7) provisions of the constitution above cited. The importer, the Court say, had purchased from the United States the privilege to sell. These were foreign goods, and the Court add that the principles laid down in this case will, they suppose, equally apply to importations from a sister State. But the Court in the same case say, that the state of things is changed if the importer sells them, or otherwise mixes them with the general property of the State, by breaking the packages, &c., to sell by retail. Seeing, then, nothing in the laws or Constitution of the United States to restrain the State from exercising this power over retailers, and supported by the opinion, although extra-judicial, of so able a Court as the Supreme Court of the United States, we are disposed to give effect to the said several acts of the General Assembly, so far as they apply to retailers, believing them to be constitutional.

It remains to be considered whether it were necessary to charge in the indictment that the plaintiffs in error, defendants below, did sell by retail. The cases cited, 2

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Burrow 1936; 1 *East.* 646, *notes*; 1 *T. R.* 144, establish the doctrine that "what comes by way of proviso in a statute, must be insisted on by way of defence by the party accused; but when exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them." It is contended that the constitutional provision is equivalent to an exception in the enacting part of a law, and ought to be observed as such by the officer of the State. The rule of law being established, convenience requires that it should be permanent, in order that each party, plaintiff and defendant, may know what he is required to show to the Court. But the case before the Court presents neither an exception in the enacting part of a statute, nor one by way of proviso. This case is the first of the kind, at least in this State, and it seems to be unimportant how it is decided. Our statute embraces all vendors of merchandise not the growth, &c., of this State. The Court, therefore, incline to think that the indictment is well enough, and that the defendant should in (8) such cases move the Court to exclude all evidence of such sales as he might lawfully make.

The judgment of the Circuit Court is affirmed.

Decisions of the Supreme Court of Missouri,

FAYETTE DISTRICT, APRIL TERM, 1831.

3	9
40a	346
3	9
45a	409
3	9
50a	249
3	9
70a	158
70a	563

STORRS v. THE STATE.

1. Indictment under the act of Feb. 4, 1825, for selling spirituous liquors without license. Several distinct acts of selling were set forth in the same count—held, that the several acts of selling constituted but one offence, and, therefore, the indictment was not liable to the objection that distinct offences were charged in the same count. (Note b.)
2. Offences of a different character or degree, upon which the judgments must be different, must be joined. (Note a.)

ON AN APPEAL from the Howard Circuit Court.

WASH, J., delivered the opinion of the Court.

Storrs was indicted under the sixth section of the act entitled "An Act to license retailers of wines and spirituous liquors," approved Feb. 4th, 1825, for selling spirituous liquors, suffering them to be drank about his house without a license therefor. The indictment charges that the said Storrs "did then and there sell and retail to one Pemberton S. Bridges of the county aforesaid, one half pint of whisky, and did then and there suffer and permit the said spirituous liquors so sold as aforesaid, to be then and there drank in his the said Storrs' shop, then in his possession, by the said Bridges and others: and the said Storrs did then and there sell and retail to one Stephen Lacey, of the county aforesaid, one half pint of whisky, and did then and there suffer and permit the said spirituous liquors so sold, as last aforesaid, to be then and there drank in his, the said Storrs' shop, then in his possession, by the said Lacey and others, and the said Storrs did then and there sell and retail to divers other citizens, to the jurors aforesaid unknown, divers other half pints of whisky. And did then and there suffer and permit the said spirituous liquors so sold as aforesaid, to be then and there

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drank," &c. The defendant demurred to the indictment and had judgment against him: to reverse which he prosecutes the present writ of error. The error assigned (10) and relied on is, that the indictment contains only one count, and that several distinct offences are charged in that count, against the said Storrs. There is no force in this objection. It is held that even distinct felonies of the same character and degree, though committed at different times, may be charged in the same indictment, and it will be no ground either of demurrer, or arrest of judgment. 1 *Chit. L. P.* 171. In such cases, however, the prosecutor may be compelled at the trial to elect on which charge he will proceed. But in the case of offences inferior to felony, the practice of calling on the prosecutor to elect on which charge he will proceed, does not exist, and the prosecutor may give evidence of several libels, assaults, &c., upon the same indictment, whether they be on the same or on different persons. 1 *Chit. Crim. L.* p. 254. So it is held that if property of several persons be stolen at one time, the whole may be considered as one taking. 1 *Hale* 531, 3 *Chit. Crim. L.* p. 353. The rule is, that offences of a different character or degree, upon which the judgments must necessarily be different, are not to be joined. In the case under consideration, it was to the interest of the defendant to consider the several acts as constituting but one offence, whether they were or were not committed at the same instant of time, which might well have been.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

(a.) See *The State v. Palmer and Doll*, 4 Mo. R., p. 454; *The State v. Kirby*, 7 Mo. R., p. 317.

(b.) *Lonton v. The State*, 7 Mo. R., p. 55.

LILLY v. THE STATE.

That certainty required in an indictment is not necessary in a warrant of commitment.

ERROR from Cooper Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

The plaintiff in error was indicted and convicted for suffering Wm. Reid to escape from the jail of Cooper county. To reverse the judgment of the Circuit Court, he (11) sues out this writ. It is contended that the indictment is defective in not setting out a sufficient warrant of commitment. It charges that the Constable was commanded, &c., to convey and deliver into the custody of the keeper of the jail of, &c., the body of William Reid, jun'r., &c., taken and brought before him the said Justice,

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and charged before him, &c., upon the oath of James Harris, &c., with stealing one sorrel horse. It is contended that the warrant ought to have contained some allegation that the prisoner was committed for *some good cause* certain, supported by oath, and that the words stealing a horse impart no crime. We are of opinion that it sufficiently appears that witnesses were examined to fix the suspicion of guilt on the prisoner. The forms of warrants of commitments found in the digest of our statute laws, and in *Chitty*, and the *Crown Circuit Companion*, are pursued. The second objection is, that horse stealing is no crime punishable by law; that it should have been charged, that the prisoner feloniously did steal, &c. In sec. 33d of the act concerning crimes and misdemeanors, page 289 of the *Revised Code*, it is enacted that if any person shall steal from any other person, &c., any horse, &c., he, she, &c., shall be deemed guilty of felony. And on conviction, &c. Without pretending to say that these words would be sufficient in an Indictment, we are inclined to think that the words are sufficient in a warrant, as they are the words used in the law. And it does not necessarily follow, that a felonious intent was not proved. It was also objected that the warrant of commitment does not show to whom the horse belonged. To this it may be answered, that it is not a necessary consequence, that there was no evidence to that purpose: and the warrant of commitment need not be so certain as an indictment, the office of which is to present to the accused the charge against which he must defend himself.

The judgment of the circuit court is affirmed.

3	12
87a	14

(12)

COUNTY OF BOONE v. CORLEW.

1. Consent to appear and submit to the judgment of a Court, waives all objection to want of form or regularity in an appeal from an Inferior Court.
2. The Circuit Court can exercise appellate power on appeals regularly taken from the County Court.
3. When parties in the County Court consent to an appeal to the Circuit Court for the opinion of the Circuit Court upon the law arising from the facts of the case, in such case the power of the Circuit Court is precisely what it would be in a cause carried up in due form of law, and in such case the Circuit Court may enter into the trial *de novo*.
4. A decision of the Circuit Court will be deemed correct, when nothing on the record shows it incorrect.

ERROR from the Boone Circuit Court.

WASH, J., delivered the opinion of the Court.

An application was made by Corlew to the County Court of Boone, to allow an account against the county of Boone for the sum of seven dollars, money improperly paid by him as Constable into the county treasury, &c. The County Court overruled the motion. Corlew excepted to the opinion of the Court, and spread the evidence on the record. An appeal was also prayed for and granted to the Circuit Court. At the February term of the Boone Circuit Court, 1830, as appears from the record, the cause came on to be argued in that Court, both parties appearing and consenting thereto, when the Circuit Court adjudged and directed the County Court to allow the account, as the money was improperly paid by Corlew, into the county treasury, under a statute that was and is unconstitutional. And that said Corlew has a legal right properly recoverable in an action for money, had and received to his use from said county: and that his costs in both Courts be also allowed and paid by said County Court. To reverse this decision of the Circuit Court, the plaintiffs have come into this Court. Four errors have been assigned. The three first amount to nothing more than a general assignment, except that in the third, the mandamus is pointed out as the proper remedy. The fourth error assigned is, that it appears from the said record and proceeding, that an appeal from said (13) County Court to the said Circuit Court, would not, by the law of the land, lie.

The points made and relied on by the Attorney General in behalf of the county, are, first, that the consent of the County Court only extended to asking the opinion of the Circuit Court as to matters of law, and did not authorize it to make any order. Second. That the evidence was insufficient to justify the County Court in allowing the account. Third. That there was no sufficient appeal, there being no affidavit. Fourth. That the law does not authorize an appeal in this case. Without regard to the order in which the points have been presented, we will first consider the third and fourth points. The 8th section of the 5th article of our State Constitution provides, that the Circuit Court shall exercise a superintending control over such inferior tribunals as the General Assembly may establish. The County Court

County of Boone v. Corlew.

is one of the inferior tribunals established by the Legislature; and by the fourth section of "An act to establish Courts of Justice, and to prescribe their powers and duties," approved January 7th, 1825, *Rev. Code*, p. 269, it is expressly provided that the Circuit Courts shall exercise appellate jurisdiction from the judgments and orders of the said inferior tribunals, in all cases not expressly prohibited by law, and shall possess a superintending control over them. It is not pretended that there exists any law prohibiting the exercise of the appellate jurisdiction of the Circuit Court in this case. The County Court, by the Constitution, and act of Assembly above cited, is subject to the supervision and control of the Circuit Court. Whether the appellate jurisdiction and controlling power of the Circuit Court is to be exercised by appeal, writ of error, mandamus, or some other process, need not be here discussed. The Circuit Court had jurisdiction of the subject matter, and that is all that need be settled. No particular mode of reviewing and correcting the judgments and orders of the County Court is prescribed. In this case the parties, by consenting to appear and submit themselves to the judgment of the Circuit Court, have waived all objections to the want of form or regularity in the appeal. And it may be proper to state, that no objection is perceived to the exercise of the appellate power of the (14) Circuit Court by appeals regularly taken. As to the first point raised, it is stated in the record of the Circuit Court, that this cause came on to be argued in this Court, both parties appearing, and it appeared that the original cause, and the decision of the County Court therein, being certified up to this Court by the consent of both parties, for the opinion of this Court upon the law arising from the facts, whereupon, &c. In a cause thus submitted, the power of the Circuit Court was precisely what it would have been had the cause come up in due form of law. Its province was to look into the whole matter, and to correct and control the order of the County Court. Whether the evidence before that Court, as preserved by the bill of exceptions, was or was not sufficient to authorize them to allow the account, need not be determined. It was perfectly competent for the parties before the Circuit Court, (and it is, indeed, the constant practice in appeals to do so,) to enter into the trial *de novo*.

There is nothing in the record to show that they did not, or that they were confined to the evidence which had been taken in the County Court. What were the facts proven or admitted in the Circuit Court, does not appear, and we are bound to conclude that the Circuit Court decided correctly, since there is nothing upon the record to show that it decided incorrectly. This view of the subject disposes of the second point raised.

The judgment of the Circuit Court is therefore affirmed, with costs.

RUTHERFORD v. WIM.

3	14
61a	290
3	14
130	302
3	14
72a	174
3	14
74a	211
8	14
84a	255

1. In a suit before a Justice, the effect of a judgment will be given to the verdict of a jury, so soon as the verdict is entered on the Justice's docket. (Note a.)
 2. An appeal taken within ten days after the Justice gave judgment, will not be good unless it be also within ten days after the return of the verdict.

ERROR from Howard Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Rutherford brought an action before a Justice of the Peace against Wim, for trespass (15) passes alledged to have been committed on land in Rutherford's possession, and had judgment. This judgment was reversed in the Circuit Court, and to reverse the judgment of the Circuit Court this writ of error was sued out.

The facts of the case are as follows: On the 23d day of October, 1830, the jury found a verdict for Rutherford before the Justice of the Peace; on the 9th day of November then next, the Justice entered up judgment, and on the tenth day of the same month Wim appealed to the Circuit Court. The plaintiff in error moved the Circuit Court to dismiss the appeal, because it was not taken within ten days after the rendering of the judgment; he also moved the Court to allow a *certiorari* to the Justice, to send up a full transcript of his docket, a diminution being alledged; both of which motions were overruled, and to the opinion of the Court exceptions were taken. The plaintiff in error also excepted to the opinion of the Court in some instructions given to the jury, on the motion of the defendant in error. But to dispose of this cause it will not be necessary to notice any thing, except the decision of the Circuit Court on the motion to dismiss the appeal. On the one side it is contended that the day on which the verdict of the jury is found, is the day on which judgment must be considered to be given, even though it be not entered up for several days after, and the Justice having no discretion, his neglect ought not to injure the plaintiff. On the other side it is said, that till judgment is entered, there is nothing to be appealed from, and that it was the duty of the plaintiff to cause his judgment to be entered. The statute provides that upon the return of a verdict the Justice shall give judgment thereon, with costs, and the appeal shall be taken within ten days after. The Court is inclined to give the effect of a judgment to the verdict, so soon as it is entered on the Justice's docket. Justices of the Peace have no such control over verdicts as Judges of the Courts of Record have; nor is it proper that they should have. After the entry of the verdict on the docket, they have no discretion to exercise; and the neglect to make the entry of the words "judgment for plaintiff" (16) on the docket, could not injure the defendant. He knew that the Justice had no power to alter the amount of the verdict. If Justices of the Peace were to be required to make formal entries, the object of the Legislature in establishing their Courts would be defeated. It is the opinion of this Court that the judgment of the

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Circuit Court be reversed and the cause to be remanded, and that the Circuit Court dismiss the appeal from its docket.

(a.) See *Davis v. Wood*, 7 Mo. R., 165.

WEST v. WAYNE.

1. Oppression growing out of fraud, and exercised in a country where no legal means of redress existed, forms a clear claim to relief. (Note a.)
2. If the defence be purely legal, it must be made at law, and cannot be made in equity, unless a good excuse be shown why it was not made at law.
3. If the transaction be founded in fraud, the relief is in both law and equity, in some instances; but if a Court of Law adjudicate the point, the matter is forever ended.
4. In cases where it is doubtful whether Courts of Law can give relief, Courts of Chancery will entertain jurisdiction.

APPEAL from the Circuit Court of Randolph county.

M'GIRK, C. J., delivered the opinion of the Court.

This is an appeal from the Circuit Court in Chancery. The bill states that in the year 1828 West, the complainant, and Wayne, the respondent, with many others fitted themselves out with outfits of goods for the Santa Fe trade; that after they had left the jurisdiction of the State, somewhere on the Arkansas river, West wishing to return home, sold his goods to the amount of \$1,100 to Wayne; that West refused to sell his goods to Wayne, unless he would give such security as West had given to those of whom he bought the goods, which security was a mortgage on land and negroes; whereupon Wayne told him that he possessed land and negroes in this State in the county of Boone; that the contract was then closed, and Wayne gave a mortgage to West to secure the payment of the money for a negro woman and several children and one quarter section of land, all in the county of Boone. The bill then avers that these representations of Wayne induced him to sell his goods as above stated; that West then started back home; that after having travelled some miles, he met a company of traders going to Santa Fe; that he informed the company what he had done; that some of that company who knew Wayne, told him that he would lose his money; that Wayne owned neither negroes nor land; that he, West, was advised by some of the company that Wayne was in fact worth nothing, and he had better go back and take his goods, or go on to Santa Fe and get his pay there. West went back and told Wayne what he had been informed. Wayne did not deny

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the truth of the report. West then demanded his goods to be delivered up to him, alledging that a fraud had been practiced on him. Wayne refused to rescind the contract, unless West would give him his note or bond for \$100. West alledges that that transaction took place in a country where no civil law existed, and not having it in his power to redress himself otherwise than by force, and seeing the extreme probability of losing the money and goods, he did, to save himself from that loss, give to Wayne his bond for \$100 for the consideration of getting the goods back again ; and that he did then get his goods back again. He further alledges that he has been sued on the bond in a Court of Law, and that judgment has been rendered against him, and execution is threatened, &c. The bill prays that the judgment may be perpetually enjoined. Wayne answers the bill, and admits that on the Arkansas river he did buy the goods of the complainant to the amount alledged, and that he then made his note for the payment of the same to the complainant. He then denies that he ever gave the complainant any mortgage on any species of property by description either real or personal. He says he admits the note he gave for the payment of the money for the goods, contained a clause by which he did acknowledge his property generally to be bound for the payment of the money, and denies positively that (18) either land or negroes were named in the said instrument, and he says he never made any other writing save as above. The defendant admits that he may have represented to the complainant that he was the owner of some slaves or negroes, but he denies that he represented to him that he was the owner of any land at that time. He admits he owned no land, and insists that he did then own some negroes, and does yet own some negroes ; he denies the complainant ever charged him with being insolvent, and says he was not insolvent then, nor is he yet insolvent. The defendant says he admits that on the next day after the purchase of the goods was made, the complainant became dissatisfied with the sale of the goods, and came back and requested him to rescind the contract and give up the goods, and that the defendant was unwilling to do so, unless the complainant would give him \$100 for his contract and his trouble, which sum the complainant agreed to give, and gave the bond sued on to secure the payment of the money. Then the goods were delivered to the complainant. He asserts that he never used any means or acts to induce the complainant to sell the goods to him, other than as above set forth, and says he made no declaration relating thereto, that was not strictly true. The complainant put in a replication and the cause was heard on the bill and answer, and on the evidence which is in substance as follows : that the defendant owned no land nor negroes, except the one-half of a small negro boy. That otherwise he was worth little or nothing, at the time he bought the goods and made the instrument to secure the payment of the money, and that he had mortgaged a negro woman and children to one Lanme & Company for \$600 worth of goods for his outfit on the trading expedition, and that these same negroes belonged to his mother at the time. Upon this evidence the Court heard the cause, dissolved the injunction, and dismissed the bill. The error assigned is a general one. The ground relied on by the appellant to reverse the decree of dismissal, and to sustain the relief he asks for, is that the appellee acted oppressively toward him, and took undue advantage of the condition of the complainant in obtaining (19) the bond for the \$100, and that he committed a fraud in pretending he had sufficient substance to secure the payment of the price of the goods, when in fact he was worth little or nothing ; that Wayne committed a fraud in executing a mortgage of property which he did not own, whereby the complainant was deceived. The com-

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plainant's right to relief is resisted on the ground that the bond was freely entered into without any duress or undue advantage used to obtain it; and, secondly, that if the complainant could have any relief, the defence should have been made at law, and the complainant having failed to do so, he is now too late. We will first examine the complainant's right to relief, on the ground of undue advantage, hardship, oppression and fraud. Mr. Givins, for the complainant, has cited several authorities which do, in our opinion, sustain his ground for relief either in a Court of Law or Equity. The first to be examined is that of *Irving v. Wilson*, 4 T. R. 485. This was a case where a revenue officer seized goods unlawfully, and after the unlawfulness was ascertained by him, he refused to deliver them up, unless the owner would pay him £2 11s. The Court held an action of assumpsit would lie to recover the money back. A part of the reason given for the decision is, that although the party might have sued the revenue officer, yet he might want his goods, and was not bound to wait the tedious process of the law. It is laid down, in *B. N. P.* 132, that a person pawned plate, and when he came to redeem, the pawnbroker refused to give up the plate, unless the owner would give him £10 over and above the legal interest, which he refused, but said he would give £4. This was refused. He then paid the £10, took his goods, and it was held an action lay to recover it back, on the ground that the owner was not bound to wait till he could get the goods by law, as he might be in great need of them. See also to this point *C. Johnson Ch. R.* 210 and *1 Ray*, R. 470. *2 Ray*. 213. These cases show that even at law, in cases of hardship and extortion, the court will give the party relief, though he might have redressed himself by due course of law; but the party is not bound to resort to that course. It is (20) the province of Courts of Chancery to relieve against fraud, deceit, hardship and oppression. Let us see if in this case there was any fraud, hardship or oppression. The defendant bought of the complainant \$1,100 worth of goods, representing himself to own property to a considerable value, sufficient to induce the complainant to believe that a mortgage of that property to him would secure the payment of the money, when in truth this matter was totally untrue. The evidence is that he only owned the one-half of a little negro boy, and otherwise was worth little or nothing, and besides that the very negroes he pretended to own were already mortgaged for a large sum of money, nearly equal to their value. Now if the negroes had been mortgaged, the suppression of that fact was fraudulent. When West sold his goods and took the mortgage, he had no means of ascertaining the truth of the representations. He was far removed from the place where the property was, and Wayne having obtained the goods by fraud at first, he uses this advantage, so obtained by fraud, to keep the goods or to compel the complainant to submit to the risk of a total loss of the money, or to give the bond. And herein consists the oppression. This oppression, exercised in a country where no legal means of redress existed, growing out of a fraud, and a deep one too, of the defendant, will, in the opinion of this Court, form a clear claim to relief. We have examined the authorities of the defendant on this point, and cannot see that they have sufficient strength to enable him to resist the claim for relief. Mr. Davis, for the defendant, next contends that if there could be any relief, the defence should have been made at law, or in other words the defence might have been made at law; and that opportunity being neglected, is totally lost. To sustain this point we are referred to the nature of the transaction, and it is said that duress of a man's goods is no ground in law or equity to set aside a bond; and also that a fraudulent act is cognizable in law, as well as in equity,

Snell *v.* Kirby.

Now it is true that when the defence is purely legal, it must be made at law, and cannot be made in equity, unless the party can show a good excuse why he did not (21) make it at law. It is believed by the Court that where the transaction is founded in fraud, the relief is in both Courts, in some instances; but if the Court of Law does adjudicate the point, there is forever an end of the matter. Here no defence was made at law, and the party was not bound to make his defence there. This doctrine we think is supported by the current of authorities; but a part of this transaction was fraudulent and the balance oppressive, and it is by no means clear that a Court of Law could, according to its mode of proceeding, give the relief asked for; and in doubtful cases of this character, Courts of Chancery will entertain jurisdiction. The decree of the Circuit Court is reversed. The cause is sent back to the Circuit Court with directions to reinstate the cause, and to enjoin the judgment at law perpetually, and to proceed in conformity to this opinion. The complainant is allowed his costs in this Court.

(a.) See Cowper, 180-1.

SNELL *v.* KIRBY.

An action of debt will not lie for the payment of a stipulated sum in property,

ERROR from the Randolph Circuit Court.

WASH, J., delivered the opinion of the Court.

This was originally an action of debt, commenced by Kirby *v.* Snell, before a Justice of the Peace, in which the plaintiff had judgment; from which the defendant appealed to the Circuit Court, where on the trial *de novo*, the plaintiff again had judgment; to reverse which Snell has brought his writ of error into this Court. The summons was in debt. The evidence is preserved by a bill of exceptions, consisting of an account stated, in which Kirby charges Snell "To 1 mare for \$40," and the testimony of a witness, who testified that the plaintiff, in the month of July, 1830, sold to the defendant a certain mare for forty dollars, eighteen dollars of which was (22) to be paid in a saddle on the 15th of September next following the contract, eleven dollars to be paid in cattle at the same time, the balance in pork at the next killing time. Upon this state of facts, the defendant's counsel moved the Circuit Court to instruct the jury, first, that the plaintiff cannot recover in his action of debt, unless the demand proved before them was for the payment of money. Second,

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that the evidence introduced by the plaintiff is inadmissible to support the account filed, &c. Third. That if the jury believe from the testimony that the contract proved was a sale of the plaintiff to defendant of a mare for which the defendant agreed to give certain property, and that the term "dollars" was used only to know how much of each kind of property was to be paid, the evidence is inadmissible under the account filed and in this form of action; which instructions the Circuit Court refused to give, and then instructed the jury, that the action of debt would lie, and that the testimony of the witness could properly be received to support the account filed in this action. To which opinion of the Court in refusing the instructions prayed for and giving the instructions to the jury, the defendant excepted, and now assigns it for error. The point relied on is, that an action of debt will not lie in this case, and on this the law is clearly with the plaintiff in error. An action of debt will not lie on a contract for the payment of a stipulated sum in property. It must not depend upon any subsequent valuation to settle the amount. This doctrine has been well settled—see 1st. Bibb 356 and 487; 2d. Bibb 584; 1st. Littell 30. In this case it is clear the property and not the money, is the object of the contract. The authorities cited by the defendant's counsel are in perfect accordance with this doctrine, or do not at all impugn it. In the case of Dunklin, Edwards and Cravens, v. McKee, decided by this Court, (*Mo. R.*, p. 128,) it is held that an action of debt will lie on a contract for the payment of money with the privilege of paying the whole or any part of it in work at a given time, and that the privilege of paying the debt in work, was only a means by which the payment of the money might be defeated, and was nothing but a defeasance. The difference in that case and the one before the Court is too obvious to require analysis or discussion. In the case of Cornelius v. McDonald, also decided by this Court, (*Mo. R.*, 2 vol. p. 55,) the point was not raised in either Court. The case of Smith v. Smith in 2 *John R.*, p. 235 has been entirely mistaken. It is placed by the counsel for the plaintiff expressly on the acknowledgment of the debt by the defendant, and the Court say that the consideration of the note is proved by the full and satisfactory acknowledgment of the debt by the defendant. There the question was not raised, whether the note was for property or for money. The proof was the full acknowledgment of debt and independent of the proof on which it was expressly decided, the fair construction of the contract as set out in the note, would have authorized the Court to regard it as a contract to pay money, with the privilege of discharging the debt in land, &c. Upon the whole, therefore, we think the Circuit Court erred, and the judgment is reversed with costs.

FENTON *v.* PERKINS.

1. When parties understand a contract differently, the jury must give to the evidence of the contract, a plain common sense construction.
2. If A. sell a horse to B. for a note on C., and afterward A. bring an action against B. for a failure to deliver the note on C., the measure of damages will be, not the value of the horse at the time of sale with interest, but what the note purports to be worth. (Note a.)
3. An instruction given by the Court, which is not required by the testimony, is therefore wrong.
4. If, in a contract for a note, the note delivered does not answer the description, it will not satisfy the contract; unless the parties knew they were contracting for the note delivered.

ERROR to Boone Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Fenton brought his action against Perkins before a Justice of the Peace, and had (24) judgment for seventy-five dollars. Perkins appealed to the Circuit Court where the judgment of the Justice was reversed. On the trial it was proved that Fenton sold a horse to Perkins for two notes, one of Perkins' himself for \$5, the other a note of John McMickle for \$75. The note of McMickle at the time of making the contract, was at the defendant's house, and he agreed to deposit it at Dr. Bennet's in Columbia for the plaintiff. A note was accordingly deposited for Fenton, which he refused to receive, alledging that it was not such a note as he had contracted for. He said that he had contracted for a note on John McMickle, and that the note delivered to him was subscribed John Mickle. Testimony was introduced to prove that Fenton knew that the note left at Dr. Bennet's for him, was the same for which he had contracted. Evidence of the value of the horse was given. It varied from twenty to forty dollars. The defendant was allowed to give evidence to the jury, that he had offered to restore the horse to the plaintiff, if the plaintiff would restore the defendant's note. The instructions prayed for by the plaintiff, were substantially as follow: First, that if Perkins and Fenton understood the contract differently, the jury must be governed by the fair and plain understanding of the evidence, *i. e.* must give to the evidence of the contract, a plain common sense construction. Second, that if the jury believed that Fenton contracted for a note of John McMickle, and that the note which had been delivered, did not agree with that description, then they must find for the plaintiff, he having a right to receive a note executed by John McMickle, subscribed with his name in a legible manner. Third, that if Fenton contracted for a note for \$75, that the value of such note, and not the value of the horse, after deducting therefrom Perkins' note for \$5, was the true measure of damages. These instructions were refused and others given. The following are the instructions given by the Court: First, that in the construction of contracts, the understanding of the parties is to be given, and that understanding is to be collected from the cir-

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(25) cumstances attending the transaction. Second, that in this case the judgment of the Justice of the Peace was glaringly wrong, it being for \$75; that the measure of damages in this case, is the value of the horse at the time of the trade and interest thereon by way of damages, after deducting the note for \$5. Third, that the mistake in the signature of the note, did not avoid the note if they believed the note was executed, and delivered by John McMickle, and that the Mc was omitted by fraud or mistake. Fourth, that if they believed that both parties knew they were contracting for the note which was left at Dr. Bennet's, that said note satisfied the contract, although they may have called it by a wrong name. To the instructions thus given, the plaintiff excepted. He also excepted to the opinion of the Court in allowing evidence to be given of an offer made by the defendant to restore the horse. The first instruction given by the Court, was in itself very correct; but it does not correspond with that requested. Perkins had received Fenton's horse, and Fenton had received his note for five dollars, and there was a conversation about the delivery of another note. But it seems there is a difference of opinion, (and possibly a difference of opinion between the parties,) about the particulars of this conversation. It is then the duty and particular province of the jury, to ascertain from the evidence the particulars of such conversation, and by giving to them a plain and fair construction, to ascertain what a man of common sense would have judged to be the agreement of the parties, without regard to the opinions and belief, or to the pretended opinions of the one party or the other. It is the opinion of the Court that the first instruction prayed for was proper to be given, and that it was not given. The second instruction given by the Court, was in itself a denial of the third asked by the plaintiff. By it the value of the horse is made the measure of damages. The case of Crews v. Dabney, 1 *Littell* 278, which was most relied on by the defendant, was a case of an executed contract; and the part of this contract about which there is doubt, and which caused the suit now in Court, is plainly executory. Dabney had (26) sold to Crews, two watches for a note of \$40, made by one Williams, represented to be temporarily absent on a visit. Dabney sued Crews, and charged in his declaration that Crews well knew at the time he made said representation, that Williams had removed from the State not to return. The inferior Court decided that the amount of the note was the measure of damages. Crews appealed, and the judgment of the inferior Court was reversed. Dabney had received the note for his watches, and could not recover the amount from the maker, and sued Crews, charging the fraud. He then goes to rescind the contract. In the case before the Court, the plaintiff had not received the note, which was promised as part of the consideration for the horse received by the defendant in exchange; but now sues for it, and if he have a right to demand and receive a note for seventy-five dollars, we must suppose the maker solvent, and that the note is worth what it purports to be. The plaintiff then having a right to demand and receive such note, the sum it purports to be worth, ought to be the measure of the damages which he can recover. Strange confusion would be introduced into the commercial world if every person, who had contracted to deliver property at a future day in exchange for property delivered to him *in presenti*, were allowed to measure the damages he should pay for a failure to deliver, by the value of the property which he had already received. The second instruction given by the Court, we think, is improper, and the third asked by the plaintiff should have been given. The third instruction given by the Court, does not seem to be required by any testimony on the record, and therefore wrong. The fourth, though not

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asked for, is very proper. These two seem to be intended as a compliance with the second prayed for by the plaintiff. But we think that they are not equivalent, and that the second instruction asked for by the plaintiff, should have been given along with the fourth instruction given by the Court; for the second instruction prayed by the plaintiff, might mislead a jury, unless it were accompanied by the fourth, given by the Circuit Court. The Court erred too, we think, in permitting the defendant (27) to give evidence of an offer to return the plaintiff's horse, if the plaintiff would return his note for five dollars. The admission of such evidence would be to permit the party to make evidence of his own honest intentions, to induce the jury to assess lower damages: or it might mislead the jury, by inducing them to believe that the defendant had a right to rescind the contract. But it is contended that under the instructions given by the Court, the jury could not have found for the defendant, unless they believed that Fenton had agreed to receive the same note which had been deposited for him at Dr. Bennet's, and that it were executed by John McMickle, though not subscribed with his name. The Court instructed the jury, that the value of the horse, the note for \$5 which Fenton had received being deducted, was the measure of the plaintiff's damages. Might not the jury have believed the horse to be worth no more than five dollars? In such case they should have found for the defendant under that instruction of the Court. Although it is not probable, they believed the horse to be worth no more than five dollars, yet it is possible; and if possible, we cannot affirm the judgment. The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

WASH, J.

I concur in reversing the judgment on the ground that the Circuit Court erred in giving its third instruction. It was calculated to mislead the jury. On the other grounds assumed, I should be in favor of affirming.

(a.) See Farwell v. Kennett, et al., 7 Mo. R. 597.

(28)

RIGGS v. FENTON.

3	28
117	081
3	28
124	432

1. The filing of a counter affidavit, in an application for a continuance, is a matter on which the law is silent, and is a matter of practice to be regulated by the Circuit Court.
2. Error will lie for a refusal to continue a cause.
3. Although no want of diligence may appear in endeavoring to obtain the attendance or the testimony of witnesses, yet if the testimony disclosed in the affidavit could not avail the applicant, the Court will exercise its discretion soundly in refusing the continuance.

ON AN APPEAL from Boone Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of assumpsit by Fenton *v.* Riggs, to recover a sum of money received by Riggs to the use of Fenton, in the province of New Mexico, to be brought here and paid over to Fenton. At the trial term of the cause in June, 1830, Riggs applied for and obtained a continuance upon affidavit, stating in the terms of the statute, that material witnesses were absent, &c. At the October term, 1830, Riggs again applied for a continuance, and stated in his affidavit (in addition to the facts shown on the first application,) the facts which he expected to prove by the absent witnesses, and the exertions made use of to obtain their testimony. The Circuit Court refused the continuance, and ruled the defendant to trial; wherein Fenton obtained a verdict and judgment, to reverse which Riggs has come into this Court. Riggs stated in his second affidavit, "that Walter Graham, one of the witnesses, on account of whose absence in part, a continuance of this cause was granted at the last term, has not since said term returned to the State of Missouri, from the Territory of New Mexico. This affiant confidently believes he will be in the county of Chariton, in this State, the place of his residence, in a few days, and that he is now on his return from New Mexico, with a company of traders now returning from that country. That he has continued in that country ever since the last term of this Court. That this affiant has had no opportunity of taking his deposition since the last term of this Court, there having been no communication between that country (29) and this, known to this defendant since that time. This affiant believes he can procure the attendance of said witness at the next term of this Court. This affiant expects and believes that he can prove by said witness that this affiant, when he received the money in the Province of New Mexico now sued for, that he was not to be accountable to the plaintiff for any risk in bringing the same to this State. That he was, in the transportation of the same to this State, to use the same means as he did in relation to his own, and that this affiant was not to be responsible to the said Fenton for the money, until the same was brought to this State, or received in this State by this affiant. That he does not know that he can prove the same facts by any other witness. And this affiant further states, that Congreve Jackson of Howard county, in this State, is a material witness for this affiant. That said Jackson

Riggs v. Fenton.

has been subpoenaed since the last term of this Court, by this affiant, to attend at this term, but has failed to attend. That he expects to prove by said witness, that this affiant had, by the laws of Mexico, to pay upon the money received for the plaintiff, the sum of 5 1-2 per cent. for the privilege of bringing said money out of that country, and that he did pay the same, &c." The plaintiff was permitted to file counter affidavits, and thereupon the continuance was refused. The points relied on by the appellant's counsel are: first, that the Circuit Court erred in permitting counter affidavits to be filed; and second, in refusing the continuance prayed for. To the first it may be answered that the laws of the State are silent on the subject. It is purely a matter of practice to be regulated by the Circuit Court. Whether it has settled rules on the subject to authorize the course pursued in this case, does not appear. It is sufficient that nothing appears to show it was an irregular or illegal exercise of its discretionary power. In reply to the second point raised by the appellant's counsel, it is urged by the counsel for the appellee, first, that a refusal to continue a cause is not error. This Court has held that error will lie for that cause, (2 Mo. R., p. 99,) the discretion is a legal one to be soundly exercised; and secondly, that the facts disclosed in the affidavits are insufficient to entitle the party to a (30) continuance. This seems to us the proper answer to be given to the second point raised. Not (as the appellee's counsel contends,) that there appears to be any want of diligence in endeavoring to obtain the attendance or testimony of the witnesses; but the testimony as disclosed in the affidavit, in our view of the law could not have availed the defendant. It is no where averred, that the money was not in the possession of the defendant in the State of Missouri, at or before the time of commencing the suit; and if that were the fact, the proof of the contract in New Mexico could avail nothing. And as to the 5 1-2 per cent. duty, paid under the laws of Mexico, on the exportation of the plaintiff's money, and for his use, it could not be received in evidence under the general issue in this cause without notice to the plaintiff. So that the Circuit Court exercised its discretion soundly, in refusing the continuance prayed for; and upon the whole matter its judgment is affirmed with costs.

Decisions of the Supreme Court of Missouri.

ST. LOUIS DISTRICT, JANUARY TERM, 1831..

PEARCE v. MEVERS.

1. An appeal will lie in an action to recover a penalty for a breach of the law concerning roads and highways.
2. In an action to recover a fine for an offence against the act concerning roads and highways, the process of the Justice held utterly void for want of parties.
3. If it appear from the record, that an appeal was taken from a Justice on the 25th, the day of trial, and that the appeal bond was dated the 26th, through neglect or mistake, this will not be sufficient ground for dismissing the appeal.

ERROR from St. Charles Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action commenced before a Justice of the Peace for the recovery of the penalty for placing obstructions in the public road, under the 10th section of the act concerning roads and highways. The process of the Justice was in these words: "State of Missouri, county of St. Charles, ss. The State of Missouri, to the Constable of Cuiver township in said county. Complaint being made to me, Milton McRoberts, a Justice of the Peace, within and for said county, upon the oath of George Meyers of said county, that on the 17th day of September, Thomas Pearce of said county did cause to be hauled and put saplins in and across a certain public road leading from St. Charles to Henry Zumalt's in the said county, contrary to the form of the statute in such case made and provided, you are therefore required to summon the said Thomas Pearce forthwith to appear before me or some other Justice of the Peace for said county, to show cause why the penalty of fifteen dollars (32) should not be levied on him, &c." The Justice gave judgment in the name of George Myers for the sum of fifteen dollars. Pearce appealed to the Circuit Court,

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and that Court dismissed the appeal on the ground that no appeal was allowed by law in such case. To reverse the judgment of the Circuit Court, Pearce now prosecutes his writ of error in this Court.

The error assigned is the dismissal of the appeal, &c. In this the Court clearly erred. An appeal will lie in all such cases. The act of 1826, p. 33, gives an appeal in all cases within the jurisdiction of a Justice, and extends the right beyond the cases provided for in the act of 21st of February, 1825. By the act concerning roads and highways, *Rev. Code*, p. 688, sec. 10, it is provided, that the penalty to be recovered shall be applied as is directed in the 6th sec. of the same act, i. e. "one half for the use of the person or persons prosecuting the same, and the other half for the use of the county." The law clearly intends that some person shall prosecute for the penalty, to the half of which he will be entitled. In this case the process of the Justice was utterly void for want of parties, and the Circuit Court instead of dismissing the appeal, should have entertained jurisdiction, and set aside the proceedings before the Justice. The counsel for the defendant insist, that although the Circuit Court erred in dismissing the appeal for the reason assigned, yet the appeal was rightly dismissed, inasmuch as it was not prayed for on the day of trial, and no notice was given as the law requires. This objection is answered by an inspection of the record, from which it sufficiently appears that the appeal was taken on the day of trial, and the bond dated the 26th, instead of the 25th, through neglect or mistake. The judgment of the Circuit Court is therefore reversed, and this cause is remanded, and that Court directed to reinstate the same and proceed therein conformably to this opinion.

(33)

JEFFRIE *v.* ROBIDEAUX.

3	33
120	144

1. An infant cannot appear by attorney.
2. If an infant appear by attorney, as well as by next friend; it will be error.
3. Every plaintiff and defendant will be taken to be of full age till the point is made, and evidence heard.
4. Judgment against an infant is good till reversed.
5. The act respecting suits for freedom, leaves the common law as it was, as regards the rights of infants to sue.
6. Irregularity is no cause of reversal, until the Court below have acted on the irregularity.

IN ERROR.

M'GIRK, C. J., delivered the opinion of the Court.

It appears by the record that in the year 1822, Jeffrie, the plaintiff in error, by Rachel Camp, his next friend, by Robert Wash, Esq., an attorney at law, presented

Jeffrie v. Robideaux.

his petition to the Circuit Court of St. Louis county for leave to sue as a poor person for his freedom. The leave was granted; the suit was instituted and the proceedings afterwards were carried on by Jeffrie and R. Camp, the next friend, by their attorney. A trial was had; verdict and judgment were against Jeffrie. At a subsequent term of the Court, Jeffrie moved the Court to set aside the judgment on the ground of the proceedings being irregular, and produced evidence to show that at the time the suit was instituted and judgment rendered, he was an infant under the age of twenty-one years. The Court refused to set the proceedings aside, and the whole case is brought to this Court by a writ of error.

The points made by the plaintiff in error are, that the Court erred in refusing to set aside the judgment for irregularity. Secondly. That the plaintiff appeared by a next friend and by attorney in the Court below, so that if he was an infant, the appearance by an attorney is error; and thirdly, that if the record does not show the infancy of the plaintiff, then the Court must take the truth to be that Jeffrie was an adult, and that an adult, except in cases of coverture, cannot appear by a next friend.

On the first point it is not entirely clear that the Court should have set the proceedings aside, for the irregularity was occasioned by the act of the plaintiff, or by the act of some one who intended to act for him. But on the second ground, there is manifest error in the judgment and proceedings. The law is, that when an infant has cause of suit, the suit may be commenced by guardian or next friend, previously appointed according to law, and where none has been appointed, then the guardianship or next friend may be made without any other formality than the next friend acknowledging in open Court that he will act as such, or the evidence may be made by the acknowledgment being in writing and filed with the declaration. No such evidence exists in this case. There was, therefore, no lawful *prochein amy*, yet one did in fact act. Now if it did appear that the plaintiff was an infant, which it does not, it would be error to appear by an unauthorized person. This person appears by attorney, as well as by next friend. This would also be error, if the plaintiff were an infant. But so far as any thing appears by the record, we are bound to suppose that this person was not an infant. Nothing appears by which we could distinguish that this plaintiff was not of age, any more than in other cases, except by a subsequent affidavit. In every case the Court will take every plaintiff and every defendant to be of full age, till the point is made and the evidence heard, and though judgment be rendered against an infant, it is good till reversed. In this case, then, for all the purposes for which the party's age is to be now considered, we take the plaintiff to have been of full age at the time the suit was commenced. It was unlawful therefore, for R. Camp to present herself as the next friend of this man in the way she did. No one has a right to bring a suit or do the business of another so as to make his acts binding in law upon that other person, without his or her consent.

It is urged by the counsel for the defendant in error, that this was a proceeding under the statute which authorizes persons holden in slavery to sue as poor persons for freedom. We have no doubt that the proceeding was of that character. The (35) act of the Legislature on that subject provides that when any person holden in slavery shall wish to prosecute his suit for freedom, he or she shall present a petition to the Court for leave to sue, and if the Court shall be of opinion that the claim to freedom is well founded, that leave shall be given to the petitioner to sue as a poor person, and the Court shall assign the petitioner counsel. In this case no counsel

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was assigned, but leave is given to sue by his next friend, R. Camp. It is assumed that the plaintiff was an infant, and that R. Camp was the next friend. This act respecting suits for freedom, leaves the common law as it was before it, as to the rights of infants to sue. If counsel had been appointed in this case, still the question, how shall an infant appear, would be the subject of consideration. If counsel had been appointed in the case, and no pretended next friend had interfered, then there would have been a binding judgment until reversed. We cannot see how this judgment can be supported; it is perhaps both erroneous and irregular. Irregularity is no cause of reversal until the Court below have acted on the irregularity. That has been done in this case.

The judgment is reversed with costs, and remanded to the Circuit Court for further proceedings.

Judge WASH having been counsel in this cause, gave no opinion.

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If letters of administration purport to be granted by proper authority, and are in due form and sealed with the office seal of the County Court, they will be good without the signature of the Clerk, until set aside for want of formality.

ERROR.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of assumpsit, brought by Thomas Caulk, administrator of the (36) estate, &c., of R. Caulk, on a promissory note made to the intestate in his lifetime. The declaration is in the usual form. The defendant pleaded that the plaintiff was not administrator of the goods, &c., of R. Caulk. Issue was taken to the country. On the trial the plaintiff gave in evidence letters of administration granted by the Clerk of the County Court of St. Louis county, in the year 1825, to Thomas Caulk, Jr. The defendant objected to the letters going in evidence. The objection was overruled.

The defendant then gave in evidence letters of administration granted by Silas Bent, Clerk, as above stated, on the goods, &c., of R. Caulk, in the year 1821, to Thomas Caulk, without the addition of Jr., and to one Stephen Hancock; and proved that Hancock took on himself the administration of the effects, and that Hancock was still living. As to the last letters, they commenced and ended by running in the name of Silas Bent, Clerk, and were sealed with the seal of the County Court, but

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they were signed John Bent, Deputy Clerk. No other evidence was given except the notes sued on. On this state of facts, the counsel for the defendant prayed the Court to say, by way of instruction, that the plaintiff could not recover. The Court refused the instruction. A verdict and judgment were given for the plaintiff. The plaintiff in error, to reverse the judgment, makes this point: that in this case the plaintiff cannot be administrator till it is shown in evidence that the former administrators were dead, or that the former letters were revoked.

We have no doubt that there cannot be in this State two sets of lawful administrators at the same time, on the same estate. In the case before us, the last administration was granted while a former grant still subsisted, and to make this good, the former letters should have been shown to have been vacated by the act of the Court, or by the death of the administrator, or by resignation. See a case in point, 8 *Cranch R.* 9, &c., Griffeth v. Frazier. To avoid the effect of this principle, it is contended by the counsel for the defendant in error, that the former letters were absolutely void (37) from the beginning, because the letters were signed by John Bent, Deputy Clerk. It is argued that the Deputy is not competent to grant letters in his own name. To support this doctrine, the case of Stuart v. Westerfield and Cane is cited, 1 vol. *Missouri Decisions*, 752. In that case the Deputy Clerk granted letters of administration in his own name. In this case the letters run in the name of the principal Clerk throughout, but are signed by the Deputy. Now the law no where requires that letters of administration should be signed by the Clerk. If they purport to be granted by the proper authority, are in due form and sealed with the office seal of the County Court, it is enough without the signature of the Clerk, at least till the letters are set aside for want of more formality. These letters seem to us to be only voidable, and not void, and we do not mean to say they are voidable, but at most only so.

The second letters in this case, unless something is yet behind which might show them good, are not sufficient to entitle the defendant in error to recover, because there was, when they were granted, a former subsisting administration.

Several other points were raised, but as this point decides the case, we will not look into them. The judgment is reversed, and the cause is remanded for further proceedings.

The defendant in error pays the costs of this writ of error.

(38)

McALLISTER v. MULLANPHY.

1. To submit a cause to a jury, after it has been submitted to a Court, is not error, but at most only an irregularity.
2. The plaintiff in ejectment may enter a remittiter when the finding is for too much, to avoid a new trial.

ERROR to St. Louis Circuit Court.

MCGIRK, C. J., delivered the opinion of the Court.

This was an action of ejectment, brought by Mullanphy against McAllister and Boler, for six hundred and forty arpens of land situate in the county of St. Louis, being sixteen arpens in width and forty arpens in length, east and west, bounded on the east by the Mississippi river, and originally conceded to Antoine Morine; also for two hundred acres of woodland, two hundred acres pasture, two hundred acres of land covered with water; also for a messuage and barn; and then the declaration continues and concludes in the usual form. The general issue was made and the cause was submitted to the Court without a jury, and the Court took till the next term to consider, and then without making any other disposition of the cause, referred the issue and cause to a jury, taking no notice of the former submission to the Court. The jury found generally for the plaintiff. The defendant moved the Court for a new trial, because the verdict was against law and evidence, and against the instructions of the Court. There is no bill of exceptions in the case. Of course we cannot say that the Court did wrong in refusing a new trial. The plaintiff entered a remittiter of all the land in the declaration mentioned, except two arpens by forty, and the Court gave judgment for the balance not remitted. The error assigned by the plaintiff in error is, that it was error to submit the cause to a jury after it had been submitted to the Court, and that the Court erred in allowing the remittiter and entering judgment thereon.

As to the first point, it is believed that the matter is not assignable for error, and that, at most, the fault, if any, can only be taken advantage of as an irregularity. But no difference is perceived to exist between this case and the case where a jury (39) separate and go home, and never deliver a verdict. It would be a mis-trial. Here the Court to whom the cause was submitted by the parties as a jury, took up the consideration of the cause in the capacity of a jury and never gave a verdict. No error in law was committed, by failing to give a verdict, though it might have been a neglect of duty. When the cause was again called and a jury about to be empanelled, then an objection might have been made to submitting the cause to a jury. No such thing was done. The party stood by, and now wishes to make an objection. It is now too late.

The next point is, did the Court err in allowing the remittiter. It is not denied that the plaintiff in ejectment may enter a remittiter, where the finding is for too much, to avoid a new trial. In this case it is said that this Court cannot see whether the remittiter was for the thing which was not proved, and that the record does not

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show it to be so. The answer to this is, that if in truth the remittiter was for the wrong thing, the plaintiff should show to this Court that it was so. This he could have done by saving the testimony; but as the matter stands on the record, we will hold the Circuit Court did right, till the contrary is shown.

The judgment of the Circuit Court is affirmed, with costs.

(40)

DOUGAL v. FRYER.

1. A limitation or personal restraint upon the power to sell, encumber, or pledge a gift is a valid limitation. (Note a.)
2. To pass an estate by estoppel the party must have power to pass it by a direct conveyance.
3. If an estate be granted to A, with a condition that he shall not sell until he shall have attained twenty-five years complete, and before the end of that time he makes a deed of conveyance to B, and after the twenty-five years complete he makes another to C, the deed to B will be void, but that to C will be valid.
4. If a limitation on the power to sell an estate for twenty-five years, the age of majority, be legal, at the time of making it, a subsequent change in the law, making twenty-one instead of twenty-five years the age of majority, cannot change or affect the limitation. (Note b.)
5. An estate was granted to several, conditioned that they should not dispose of the same, unless they did so *unanimously and with one consent*, and that in case one or more of the grantees died, those remaining should be heirs to the deceased. The grantees died, except one. Held, that the consent of the remaining grantee is sufficient to pass the estate.
6. It was stipulated in a deed that the same should be void, unless the purchase money was paid at the specified time. The money was not paid at that time, but was afterwards paid. Held, that the grantor was the only person who could have taken advantage of the non-payment of the money at the time specified, and that by afterwards accepting it he had waived that advantage.

ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of ejectment brought by Fryer *v.* Dougal, to recover a lot of ground in the city of St. Louis. The case was submitted to the Court below, and the facts found after the manner of a special verdict, and upon the finding, judgment was rendered for Fryer, to reverse which, Dougal now prosecutes his writ of error in this Court.

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The facts as found by the special verdict are in substance, that on the 8th day of November, 1803, Santeago Clamorgan, and Joseph Braseau, at St. Louis, in the province of Upper Louisiana, before Carlos Dehault Delasous, then Lieutenant Governor of Upper Louisiana, in the office of a public scrivener, and in the presence of two attesting witnesses, executed an instrument of writing, by which the said Clamorgan (41) sold, ceded, transferred and abandoned to said Joseph Braseau, forever, among other things, a lot of ground of one hundred and twenty feet front, by two hundred feet in depth; situated in the upper part of the city of St. Louis, on Church street, &c., to have and dispose of it according to his will, as of a thing to him appertaining and rightfully acquired, and acknowledged to have received the consideration of said sale at the time of the execution thereof; and the Court sitting as a jury further found, that the said Joseph Braseau, by the same instrument in writing, (in consideration of the friendship which he professed for his God-son, called St. Eutrope, the natural son of said Clamorgan, as also for two other natural children of said Clamorgan, one a little girl called Apoline, who is described in said instrument as being of the age of eight months, the other a little boy called Cyprian Martial, who is also described in said instrument as being of the age of about five months); made a pure irrevocable donation of the said lot, to the said St. Eutrope, Apoline, and Cyprian Martial, to be disposed of as a thing to them appertaining in full propriety and rightfully acquired, *upon the burthen and condition of not being able to use the said lot for selling it*, encumbering it, or pledging it, before the youngest shall have twenty-five years complete, when they all unanimously and with one consent, may dispose of the same according to their free will; and in case the said boys or girl shall die before the age of twenty-five years, or after, those remaining alive shall be heirs of the said deceased, that is, if said deceased shall have no children to inherit, but in that case, those children shall be heirs on the part of the deceased father or mother. And the Court sitting as a jury did further find, that said instrument in writing was recorded in the office of the recorder of the county of St. Louis, on the 18th day of July, 1825: that the said St. Eutrope was born free on the 13th of April, 1802; that the said Apoline was born free on the 7th of February, 1803, and that the said Cyprian was born free on the 10th of June, 1803: that before the 15th of November, 1826, said Eutrope died intestate without issue: that on the said last mentioned day, the said (42) Apoline and Cyprian executed in due form of law, a deed of partition, which was duly acknowledged and recorded in the proper office on the 3d of July, 1827: that previous to the 20th of Sept., 1827, the said Cyprian died intestate and without issue, and that on the said 21st of Sept., 1827, the said Apoline executed, for a valuable consideration, a deed to Charles Collins, which was duly acknowledged and recorded the 29th of January, 1828: that on the 9th of July, 1828, the said Apoline, for a valuable consideration, executed also a deed to the plaintiff below, (Fryer,) which was duly acknowledged and recorded on the 11th of July, 1828: that the consideration of \$600 expressed in the last mentioned deed, was paid, though not at the time stipulated: that the lot in the declaration mentioned is part of the lots specified in the said several deeds executed by said Cyprian and Apoline, and by said Apoline, and is part of the lot conveyed by Clamorgan to Braseau, and by Braseau to St. Eutrope, Apoline and Cyprian, as aforesaid: that the lot in the declaration mentioned was conveyed by the said Charles Collins to the defendant, Dougal, on the 22d of November, 1827, and that said Dougal was in possession thereof at the commencement of the suit. The several deeds referred to, are set out in the special verdict,

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and form part thereof. In the deed from Apoline to Collins, she covenants to warrant and defend the title of the premises in dispute in and to the said Charles Collins, his heirs and assigns, &c., against the claims of all persons, &c.

For the plaintiff in error, it is insisted, first, that Fryer is estopped by the deed from Apoline to Collins; as privy in estate and contract, with full notice of the prior sale, as is evidenced by his own deed, &c.

Second. That the deed to Fryer is fraudulent and void, both by statute and at common law.

Third. That the deed to Collins is good and effectual to convey all the interest the vendor had at the time, notwithstanding the condition in the deed from Braseau.

Fourth. That if the deed to Collins be inoperative, so also is the deed to Fryer, (43) for the same condition which limits the right to sell to twenty-five years, also limits it *forever* unless done *unanimously and with one consent*.

Fifth. The deed to Fryer is void, for that the \$600 were not paid as stipulated, and the deed was to be void unless they were so paid, &c.

Sixth. It was also urged that the condition or limitation in the deed from Braseau was repugnant and void for that reason. If this last position were true, the cause could be readily disposed of; but we cannot view it in that light. The limitation is not upon the estate, but upon the power to sell, &c., and may well accord with the maxim, that he who has power to give, has power to prescribe the terms of the gift, and *cujus est dare ejus est disponere*. It is not repugnant to the full property conveyed in the deed from Braseau, that the power of full enjoyment or alienation is withheld for a precise or limited period, (i. e.) until the age of majority under the Spanish law. The condition was not only not illegal, but in strict accordance with the law then in force. It is not believed, however, that any provision in the Spanish law, in force at that period, would have prevented Braseau from extending the limitation beyond the age of majority. The principles of the common law assuredly would not have prevented him from doing so. The limitation or personal restraint on the power to sell, &c., imposed by Braseau being valid, let us consider the other points as they have been raised.

First. Then is Fryer or Apoline estopped by the deed to Collins? We think not. If so, that would be done indirectly, which could not have been done directly. To pass an estate by estoppel, the party must have had power to pass it by a direct conveyance; which in this case Apoline had not.

Second. Is the deed to Fryer fraudulent and void? This must depend upon the validity of the deed from Apoline to Collins. Under the view we have taken of the matter, Apoline had no power to sell to Collins, and might well avoid her deed in that behalf, and we would liken it to a conveyance made at this day by a minor under our law, who on arriving at the age of majority should sell to a person who had full knowledge of the previous conveyance.

(44) As to the third point in addition to what has been before said, the change in the law making 21 instead of 25 years the age of majority, cannot change or affect the limitation. If it were legal at the time it was imposed, however arbitrary and unreasonable it might seem, it would still be good for the term prescribed.

Fourth. The fourth point raised has no force in it. The terms of the deed from Braseau show plainly that in case any of the grantees should die without issue before the expiration of the period limited, the part or portion of those dying should belong to the survivor, and Apoline is shown to have been at the date of her deed to

Grimsley v. White,

Fryer, sole survivor—the other grantees having died without issue—so that her consent alone was sufficient to pass the estate, which should have been done “unanimously and with one consent” had the other grantees or either of them been living.

Fifth. It is sufficient that the only party who could take advantage of the condition, accepted the money tendered on a different day, and thereby waived that advantage.

Upon the whole matter, therefore, the judgment of the Circuit Court is affirmed, with costs.

- (a.) See Collins v. Clamorgan, 5 Mo. R., p. 273.
(b.) See Collins v. Clamorgan, 6 Mo. R., p. 170.
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(45)

GRIMSLY v. WHITE.

A. and B. became the joint purchasers of a lot, which was afterwards divided by a deed of partition, executed by each party, and conveying to each an estate in fee simple. A.'s house stood in part on the street adjoining the lot divided, and three feet and upwards of B.'s house was on that part of the lot conveyed to A. At the close of the deed of partition, it was covenanted that as a part of B.'s house was on A.'s part of the lot divided, and a part of A.'s house on the adjoining street, when the corporation of the town in which the lot was situated, or any competent authority, should demand of A. the land which he enjoyed on the street, then on the demand of A., B. should abandon or remove from the three feet or upwards which he enjoyed belonging to A. Held that B. was rather a tenant by sufferance, and that A. could recover the three feet and upwards without proving a demand on himself by the corporation or other competent authority.

APPEAL from the Circuit Court of St. Louis county.

TOMPKINS, J., delivered the opinion of the Court.

Grimsley brought his action of ejectment against White in the Circuit Court of St. Louis county; judgment was there given for White, the defendant. To reverse this judgment Grimsly appeals.

Grimsley and White, it appears by the facts preserved in the bill of exceptions, were joint purchasers of a lot in the city of St. Louis, bounded on the east by Church or Second street, and on the south by north C. street. This lot extending fifty feet, by estimation, on Church street, by one hundred and twenty feet on north C. street, at right angles with Church street, was divided between them by deed of partition.

Grimsley v. White.

executed by each party, containing the usual covenants; each party took an estate in fee simple in his share. Grimsley's portion was bounded by north C. street on the south, and extended 20 2-100 feet along the Second or Church street to the corner of White. At the close of the deed of partition, and after each party had conveyed to the other an estate in fee, in his respective portion, comes another provision in the following words: "It is further covenanted, understood, and agreed upon, by and between the parties to these presents, that whereas in the within mentioned allotment or partition, there are three feet and fifty-two hundredths of a foot (46) of ground appertaining to Thornton Grimsley, and on which the south end of said Joseph White's house is now erected, and whereas the said Thornton Grimsley has a part of his house erected on north C. street, now if at any time hereafter, or as soon hereafter as the corporation of the city of St. Louis, or any other competent authority, shall demand or require from the said Thornton Grimsley the said quantity which he enjoys on said north C. street, then on demand of the said Thornton Grimsley, his heirs or assigns, to said Joseph White, his heirs or assigns, he, the said Joseph White, his heirs or assigns, shall without delay abandon or remove from the said three feet and fifty-two hundredths of a foot of ground, running, &c., (describing the line between White and Grimsley,) to be possessed and enjoyed by the said Thornton Grimsley, his heirs and assigns, as herein intended in the part allotted to him by these presents; in witness," &c. The deed of partition here concludes. Much testimony was given to prove a demand by competent authority from Grimsley, for the quantity which he enjoyed on said north C. street, about the effect of which the different members of the Court entertain different opinions; but being of opinion that the case may be decided from the face of the deed itself, we pass on to the deed.

It was before observed, an absolute estate in fee had been in the first part of the deed of partition made to Grimsley by White: the words are not quoted, because no doubt as to their import was expressed, and at the close of the deed comes the covenant of White, that he will, on the happening of a certain event, do what he had already by his deed said was done, that is, give Grimsley possession of the land described, so that he might enjoy the estate conveyed to him. There is no covenant on the part of Grimsley, that White shall enjoy this land till the happening of the events in the deed mentioned. *Shepherd's Touchstone*, pages 86-7, has been referred to, to show that all parts of the deed must be taken together in construing it, and that we must be liberal in the construction of words *ut res magis valeat quam pereat*, to comply with the intention of the parties: in a note to page 87 of the same author, (47) it is said that a distinction obtains betwixt a deed poll and an indenture; that the latter is to be regarded as the words of both parties. Now admit this rule, and we have only the words of both parties that White would, on a certain contingency, deliver up some of Grimsley's land, which he had just before granted to him absolutely, and covenanted with him for quiet enjoyment, &c.

White seems to be rather a tenant by sufferance of Grimsley. The Circuit Court had instructed the jury that Grimsley could not recover under said deed the land sued for, unless he proved that a demand had, by the corporation of the city of St. Louis, or some competent authority, been made of him, of the quantity which he enjoyed on north C. street. This instruction we think should not have been given, but the jury should have been instructed that Grimsley could recover under the deed without proving a demand.

Barns v. Holland.

The judgment of the Circuit Court is therefore reversed, and the cause remanded to be proceeded on in conformity with this opinion.

BARNs v. HOLLAND.

1. A plaintiff may sue on all or only a part of the demands he may have against the same defendant, before a Justice of the Peace, and cannot be compelled to consolidate his actions after he may have sued on several demands. (Note a.)
2. By dismissing an appeal from a Justice, the Circuit Court leaves the judgment of the Justice in full force.
3. By dismissing an appeal, the Circuit Court divests itself of the power to reverse the judgment of a Justice.

ERROR from the Circuit Court of Franklin county.

TOMPKINS, J., delivered the opinion of the Court.

Barns sued Holland in debt before a Justice of the Peace, and had judgment. Holland appealed to the Circuit Court, where his appeal was dismissed, and the (48) judgment of the Justice was reversed. To reverse the judgment of the Circuit Court, Barns prosecutes his writ of error.

From the bill of exceptions we learn that the defendant showed the Court that there were then pending in that Court two other suits between the same parties, brought there by appeal from the judgment of the same Justice who tried this cause. It appeared also that the judgments rendered by the Justice were for the following sums: one for ninety dollars debt, and six dollars ninety-seven and a half cents damages; another for sixty dollars debt, and eleven dollars and eighty-five cents damages; and the third for thirty-seven dollars debt, and five dollars and eight cents damages. The three judgments aforesaid were obtained before the same Justice of the Peace, and the suits were all founded on three several notes delivered to the Justice by the plaintiff at the same time to be sued on, and suit being accordingly commenced on them, they were all tried on the same day.

The defendant then moved the Court to consolidate the said actions, "and the Court thereupon (it is said in the bill of exceptions) ordered that this and the two other suits should be dismissed for want of jurisdiction in the Justice of the Peace of the said suits."

The act establishing Justices' Courts, and regulating the collection of small debts, gives the Justices of the Peace cognizance of all actions of debt, covenant, assump-
sit, book account, and other actions arising on contracts, where the sum or balance

Barns v. Holland.

due, or damages or thing demanded, shall not exceed ninety dollars. Each several note sued on is a separate demand, neither of which exceeds ninety dollars. The mode of proceeding is prescribed by the statute, and no power is given by it to the Justice, or to any other judicial officer, to compel the plaintiff suing before a Justice of the Peace, either to sue on all the demands he may have on one defendant, or to consolidate his actions after he may have sued on several demands. It seems to be the policy of the law making power to induce creditors to collect debts before a Justice of the Peace, in order to prevent the accumulation of costs, and the defendant by executing to the plaintiff three several notes, seems to have preferred that mode (49) of proceeding. Why the appeal was dismissed does not appear, except from the reasoning of the Court saved in the bill of exceptions. The judgment of the Justice, if he had no jurisdiction, should certainly have been reversed. But the Circuit Court dismissed the appeal, and having thus divested itself of all control over the cause, then reverses the judgment of the Justice. By dismissing the appeal from the Justice, the judgment of the Justice is left in full force; for the appeal only had suspended the Justice's power to issue execution. The appeal seems to have been well and regularly taken; had it not been so, the judgment of the Circuit Court dismissing it must have been affirmed. There is error then, we think, in dismissing the appeal, and still more error in reversing the Justice's judgment, for we think he had jurisdiction; and even if he had none, the Circuit Court, by dismissing the appeal, had lost the power to reverse the judgment; for the appeal alone had given the Court possession of the cause.

The judgment of the Circuit Court is therefore reversed, and that Court is required to restore the cause to its place on its docket, and to proceed therein in conformity with this opinion.

(a.) See *Sykes v. Planters' House*, 7 Mo. R., p. 478.

BONNEY v. BALDWIN & SPENCER.

1. When a legal notice has not been given, the Court will not presume such notice from the fact that the party entitled to such notice comes into Court and moves to dismiss the cause. (Note a.)
2. But if the party to whom notice should have been given, proceeds in the cause by pleading to the merits, or by doing any other act to admit notice, the Court will presume such notice.

ERROR from St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Baldwin and Spencer sued Bonney before a Justice of the Peace, and obtained (50) a judgment by default. From the judgment of the Justice, Bonney appealed to the Circuit Court, and that Court dismissed the appeal. Bonney by writ of error has brought the cause here, and assigns for error that the Circuit Court ordered the appeal to be dismissed from its docket, on the ground that it had been improperly granted. There is also a general assignment of errors. No exceptions were taken to the opinion of the Court. From the Justice's transcript, it appears that judgment was taken on the 8th day of April, and that the appeal was asked for on the 18th day of the same month. At the first term of the Circuit Court, the "defendant" continues the cause at his own cost. The term *defendant* used here is not the most accurate; but it is reasonable to suppose the appellant was intended, he having been the defendant before the Justice of the Peace; and when the cause comes up from the Justice to the Circuit Court, the plaintiff is required to make out his case against the defendant as if it were a new one. See *Revised Code*, p. 483, sec. 30. The Circuit Court dismissed the appeal from its docket, "because (as the transcript of the record says) it appeared to the Court that the appeal in this case was improperly granted."

It is contended by the plaintiff in error, that the Circuit Court dismissed his appeal because he did not, when he applied to the Justice to set aside the judgment by default, show good cause for setting it aside; and he contends that the act of 23d December, 1826, supplementary to the act establishing Justices Courts, &c., repeals the provision found in the 12th and 22d sections of the act establishing Justices Courts, &c., (see *Revised Code*, p. 473,) and which makes the right to an appeal conditional. To this it may be answered, that it is quite immaterial for what reason the Circuit Court dismissed the appeal: its reasoning may be very correct, and often does assist us in the construction of the statutes; but it is no part of the record, although it be saved by the diligence of the parties, or of either of them. The business of this Court is to inquire if there were any good reason for dismissing the appeal.

(51) The defendant in error, by his counsel, contends that the appeal being taken after the day of trial, and there being no notice given of such appeal as the law requires, the judgment of the Circuit Court must be affirmed; "that the defendants in

Bonney v. Baldwin & Spencer.

error had kept out of the way, and the Court, when the cause was called, finding no notice of the appeal, dismissed it as in duty bound."

This Court has frequently said that it would not, where a legal notice had not been given, presume such notice from the fact that the party to whom such notice should have been given, came into Court and moved to dismiss the cause. This declaration is made in the opinion delivered in the case of *Hempstead v. Darby*, page 25th of the 2d volume of the decisions of this Court, and it was there added that had Darby proceeded in the cause by pleading to the merits, or by doing any other act to admit notice, (perhaps by asking a continuance of the cause,) the case would have been different. The defendants in error do not appear to have taken any step in this cause to admit that the Court had it legally on docket; and we finding that the appeal was taken after the day of trial, and that there was no notice thereof given, are of opinion that the cause was correctly dismissed by the Circuit Court. Whether the provisions found in the revised code to regulate the appeal in case of judgments by default be repealed by the provision in the 2d section of the act of 23d December, 1826, page 33 of the pamphlet edition of the acts of that session, it is not now necessary to decide. The judgment of the Circuit Court is affirmed.

(a.) See *Evans v. King*, 7 Mo. R., p. 411.

Decisions of the Supreme Court of Missouri,

BOWLING GREEN DISTRICT, APRIL TERM, 1831.

BLANTON v. JAMISON.

It is fair to infer every thing against a Sheriff's return which its departure from the statute will warrant.

3	52
60a	164
3	52
105	23
105	24

ERROR from the Lincoln Circuit Court.

3	52
93a	6

WASH, J., delivered the opinion of the Court.

3	52
174	304

This was an action of ejectment, brought by Jamison against Blanton in the Lincoln Circuit Court, in which Jamison obtained a judgment by default, to reverse which, Blanton now prosecutes his writ of error in this Court.

Several points have been raised by the counsel for the plaintiff in error, in which the second only will be considered by the Court, viz: "whether the Sheriff's return on the summons shows a legal and sufficient service." The return is in these words: "I served the within summons on Benjamin Blanton, the defendant, by going to his house and leaving a true and attested copy of the summons and declaration with Lovel Harrison, a white person of said Blanton's family, above fifteen years of age, on the 23d day of Sept., 1829, in Hurricane township, Lincoln county."

By the 5th sec. of "an act to regulate proceedings at law," *Rev. Code*, p. 623, it is provided, "that the service of a summons shall be by reading the writ or declaration, petition or statement to the defendant, or by leaving a true and attested copy of the same, at the dwelling house or place of abode of the defendant, with some white person of the family at least fifteen years of age, or by delivering him a copy of such (53) writ and declaration, petition or statement." Every word of the return may be true, and yet the service have been made in a manner very different from that prescribed in the statute. The Sheriff may not have gone to the dwelling house of Blanton, or he may not have left the copy at the dwelling house or place of abode.

Hayton v. Hope.

It is fair to infer every thing against the return, which its departure from the statute will warrant, and which we are not precluded from doing by its terms; and the service was clearly insufficient if made by leaving a copy elsewhere than at the dwelling house or place of abode. The judgment of the Circuit Court is therefore erroneous, and must be reversed, with costs, and the cause remanded.

HAYTON v. HOPE.

1. When an appeal from a Justice of the Peace is not taken on the day of trial, the other party is entitled to notice.
2. A judgment for greater damages than the plaintiff has claimed is erroneous. (Note a.)

ERROR from the Callaway Circuit Court.

WASH, J., delivered the opinion of the Court.

This was originally an action of debt commenced by Hope against Hayton before a Justice of the Peace to recover eighteen dollars, the balance of an account stated and filed with the Justice, on the 11th of September, 1830. The cause was tried before the Justice, and the defendant had verdict and judgment. On the 14th of the same month, Hope, the plaintiff below, appealed from the judgment of the Justice to the Circuit Court, where he obtained a judgment by default against Hayton, for the sum of twenty-seven dollars. To reverse which Hayton has come into this Court.

Various errors have been assigned and relied on by Mr. Buford for the plaintiff in error; only two of which need be now considered.

First. That the appeal on the 14th, three days after the trial before the Justice, (54) without notice to the defendant, was illegal; and

Second. That the judgment in the Circuit Court, for twenty-seven dollars, when the plaintiff in his account filed demanded only eighteen dollars, is erroneous.

As to the first point it is provided by "an act establishing Justices Courts and regulating the collection of small debts," *Rev. Code*, p. 473, sec. 22, that "appeals may be taken within twenty days after the Justice has rendered judgment, &c.;" (as the law now stands he must appeal within ten days; see *L. Mo.*, session 1826, p. 32,) and by the 23d section of the same act it is further provided, "that in all cases of appeals not prayed for on the day the trial is had, the party appealing shall notify in writing, the opposite party or his agent," &c.

Bartlett v. McDaniel.

In the case before the Court, the appeal was not taken on the day of trial, but three days thereafter, and the defendant was clearly entitled to notice in the manner prescribed in the act.

As to the second point it has been decided by this Court, (1st vol. *Mo. R.*, p. 137; *Carr & Co. v. Edwards,*) that a judgment for greater damages than the plaintiff has claimed is erroneous, and may for that error be reversed. Such was clearly the common law on the subject.

In proceedings before a Justice of the Peace, the bond, note, account, or statement filed with the Justice, is, as to this purpose, to be regarded as the plaintiff's declaration or count. On both of these points, therefore, the judgment of the Circuit Court is erroneous and must be reversed, and the cause remanded.

(a.) See *Maupin v. Triplett*, 5 *Mo. R.*, p. 422.

(55)

BARTLETT v. McDANIEL.

1. An appearance and defence waives an imperfect return of the service of a summons.
2. Appearance to an action, and defence in such action, will not cure a material defect in the declaration.
3. The want of a statement of the cause of action before a Justice of the Peace, will not be cured by appearance and defence.

ERROR from Marion Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Bartlett sued McDaniel before a Justice of the Peace and obtained a judgment. In the Circuit Court, to which McDaniel had appealed, the judgment of the Justice was reversed and the cause dismissed, and to reverse this judgment Bartlett prosecutes his suit here by writ of error.

The action before the Justice was for damages sustained by plaintiff, by reason of a trespass charged to have been committed by the defendant, by castrating the plaintiff's bull. In the fifth section of the act to establish Justices' Courts, &c., it is required that in all suits a brief statement of the cause of action, and the amount claimed, shall be made in writing and filed with the Justice, and the same or a copy annexed to the summons; and that the service thereof shall be by reading the original summons, and the complaint or statement annexed thereto in the hearing of the defendant. The plaintiff filed with the Justice a sufficient statement of his cause of

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action, and the summons of the Justice required the defendant to answer unto Robert B. Bartlett in an action of trespass *vi et armis* for castrating a bull, damages forty-five dollars. It does not appear that a statement of the cause of action was either annexed to the summons or read to the defendant. The defendant appeared before the Justice and defended.

It is contended by the plaintiff:

First. That the defendant attended before the Justice of the Peace and defended, and thereby waived all exceptions.

Second. That the notice of his complaint being substantially incorporated in the (56) summons, it was not material that the statement required by the act should be annexed to the summons, and read to the defendant.

First. It is true that if there has been an imperfect return of the service of a summons and the defendant appears and defends, he by such act waives the want of notice of the commencement of the plaintiff's action; and this is all the plaintiff's authorities prove: but when was it ever known that appearance to an action and defense in such action, cured a material defect in a declaration? If a defect in a declaration could not then be cured, much less could the want of a declaration be cured. The brief statement of the cause of action is the act of the plaintiff: the defendant is entitled to have such statement to assure him of the nature and extent of the plaintiff's demand. It is not enough that the Justice has in his summons informed the defendant of the plaintiff's demand. We have no evidence on the record, that the plaintiff's declaration was seen by the defendant on the trial. The plea which the defendant might in a Court of record have filed, would be evidence against him, that he had seen the declaration, if it appeared that one had been filed. In this case it appears from the Constable's return, that the plaintiff's statement of the cause of action was not read to the defendant, and it nowhere appears or can appear in a regular course of proceedings of the Justice's Court, that the defendant defended against the demand of the plaintiff made in his statement filed.

The second point is decided by the foregoing view and decision of the first.

The judgment of the Circuit Court is, therefore, affirmed.

M'GINK, C. J., dissenting.

(57)

ROBBINS v. LINCOLN COUNTY COURT.

1. A county warrant will bear interest after presentment at the treasury and refusal of payment by the treasurer.
2. A county warrant must be presented at the treasury and payment refused before any interest arises.

ERROR from the Circuit Court of Lincoln county.

M'GIRK, C. J., delivered the opinion of the Court.

This was a proceeding by mandamus, in the Circuit Court, by Robbins against the County Court, to compel the County Court to audit and allow interest to him, due as he alledged on a county warrant. The record shows that Robbins had and held a warrant on the county treasury, and that he presented the same at the county treasury, to the treasurer, for payment, and that payment was refused, on the ground that there were no funds in the treasury. The plaintiff in error then applied to the County Court to audit the interest due on his warrant, and give him a warrant for the interest, which was refused.

The Circuit Court was applied to for a mandamus to compel the County Court to audit the interest, which was refused. To reverse this decision the cause is brought here. The only question presented is, do the warrants issued by the County Court bear interest? If they bear interest, then the plaintiff would be entitled to his warrant for the amount of interest, as the treasurer is expressly required only to pay money on the order of the County Court.

The law relied on by the plaintiff in error is, the first section of an act, entitled, an act regulating the interest of money, see *Revised Code*, 461, which says that creditors, excepting as hereinafter excepted, shall be allowed to receive interest at the rate of six per centum per annum, for all moneys after they become due, on bond, bill, promissory note, or other instrument in writing, &c. It is insisted by Messrs. Carr and Chambers, counsel for the plaintiff, that this act applies to their case; that here money appears to be due by an instrument in writing, which is the warrant and order (58) of the County Court. It is contended on the other side by Mr. Hunt, the Circuit Attorney, that this act does not apply to the case, and he insists that when the Legislature made the above act, they only had in view individual debtors, and not counties as debtors; otherwise the county would have been named.

It may be true that the Legislature did not even so much as think of embracing in the law, counties as liable to pay interest. But the words of the act are extensive enough to embrace all persons, and bodies, capable of owing money by bond, bill, promissory note, or other instrument in writing. By law the county is able to buy and sell certain things, to contract and be contracted with, and a County Court is by law expressly required to audit and allow all demands against the county, and to draw a warrant on the treasury for the amount allowed; here there is an instrument in writing, which shows money is due, but we are clear that the warrant must be presented at the treasury for payment, and payment refused, before any interest arises;

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that has been done in this case. But it is said interest will arise from day to day, and will the holder of the warrant be allowed to present it to the County Court, and have his interest audited from day to day? The answer to this is, that from year to year would seem to be often enough to have interest audited.

The judgment of the Circuit Court is reversed; and this cause is sent back with directions to the Circuit Court to proceed in conformity with this opinion.

3	59
107	167

(59)

NEIL & FERGUSON, EXR'S. OF FERGUSON, v. DILLON.

1. In repealing the law requiring a brief statement of the cause of action to be filed, in suits before a Justice of the Peace, the Legislature necessarily repealed the law requiring this brief statement or a copy to be annexed to the summons and read to the defendant.
2. The Court will not presume that the Legislature intended that a copy of the bond, note, &c., should be annexed to the summons and read to the defendant.
3. That the note on file is made payable to an individual without the addition *senior*, when the suit and proceedings are carried on by an individual of the same name with the addition *senior*, is not sufficient ground for dismissing a suit.

ERROR from Callaway Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Neil and Ferguson sued Dillon before a Justice of the Peace, and judgment was given against them. They appealed to the Circuit Court, and on motion of the appellee the cause was dismissed.

The appellee moved the Circuit Court to dismiss the appeal for the following reasons:

First. Because the note on file was not served on the defendant with the summons, nor did it go out with the summons.

Second. Because said note on file is made payable to John Ferguson, and the suit and proceedings are in the name of the executors of John Ferguson, sen'r.

The act to establish Justices' Courts, provides that in all suits a brief statement of the cause of action and the amount claimed, shall be made in writing, and filed with the Justice, and the same or a copy annexed to the summons; and that the service thereof shall be by reading the original summons, and the statement or a copy annexed thereto in the hearing of the defendant, &c. See *Revised Code*, pages 473-4. By an act approved 23d Dec., 1826, it is declared, that so much of the former law as requires that in all suits for debt, or on account, a brief statement of the cause of

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action shall be made and filed with the Justice, shall be and is repealed. Provided, that no Justice of the Peace shall issue his summons or warrant, unless the plaintiff (60) by himself or agent, shall have filed with the Justice the bond or note, bill or account, on which the demand is founded.

On the part of the appellee it is contended, that by a fair construction of the two acts, the Justice is required to annex a copy of the bond, bill or account on which the demand is founded, to the summons, and that the service must be by reading the original summons, and a copy of the bond, bill, note, or account, &c.

For the appellant it is contended, that even if the construction of the statutes contended for by the appellee be correct, yet the appellee had waived his right to take advantage of this omission, by appearing and defending before the Justice.

It is not material to decide now whether the appellee, by defending before the Justice of the Peace, has waived his right to take advantage of an omission of the plaintiff, to file his note or brief statement. The Legislature in repealing the provision requiring a brief statement of the cause of action, &c., to be filed, repealed, necessarily, the provisions requiring this brief statement, or a copy, to be annexed to the summons, and read to the defendant, along with the summons. As a substitute for the brief statement, the plaintiff is now required to file the bond, note, &c. We will not presume that the Legislature intended a copy of the bond, note, &c., to be annexed and read to the defendant along with the summons. The Legislature would no doubt have made the provision by express enactment, if it had been intended that the copy of the bond and note, &c., should be annexed to the summons, and read to the defendant.

The second reason for dismissing the cause has with us but little weight. The name of the payee of the note was John Ferguson. It was the appellees' act to call him so in the note, and he could have proved that the testator was not the person to whom the note was made, had the fact been such.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

(61)

JANE (a slave) v. THE STATE.

1. If the fact be stated, as to the time or place with repugnancy, or uncertainty, the indictment will be bad.
2. If two times or places have been previously mentioned, and afterwards a part only is laid "then and there," the indictment is defective, because it is uncertain to which it refers.
3. An indictment against a slave for preparing, exhibiting, or administering medicine, must charge the act to have been done feloniously, or with a felonious intent.

ERROR from Callaway Circuit Court.

Per Cariam. Jane was indicted in the Callaway Circuit Court for the murder of her infant child. The indictment contained three counts. She was convicted on the first and third counts, and acquitted on the second. To reverse the judgment of the Circuit Court, she now prosecutes her writ of error in this Court.

The first count charges that the prisoner "on the 8th and 9th days of December, in the year" &c., "at" &c., "did knowingly, wilfully, feloniously and of her malice aforethought, mix and mingle a certain deadly poison," &c., "and afterwards on the days and year aforesaid," &c., "gave to her said infant child, Angeline, to drink," &c., "that the said Angeline did then and there take, drink, and swallow the same," &c., "and by the operation thereof, became sick," &c., and "from the said days and year aforesaid on which she the said Angeline so took, drank and swallowed down the same as aforesaid, until the 11th day of December in the year last aforesaid, at the county of Callaway aforesaid, did languish and languishing did live, and on said 11th day of December in the year last aforesaid, the said Jane, that she might more speedily kill and murder said Angeline, with force and arms at the county of Callaway aforesaid, in and upon the said Angeline then and there being, feloniously, wilfully, and of her malice aforethought, made an assault, and that the said Jane, then and there in and with bed clothes, feloniously, wilfully and of her malice aforethought, did wrap up and cover over said Angeline, by means of which wrapping up and covering over said Angeline in and with said bed clothes, by the said Jane as aforesaid, (62) the said Angeline was then and there choaked, suffocated and smothered; of which said choking, suffocating, and smothering, and of the poison aforesaid, so drank, taken and swallowed down into her body as aforesaid, and of the sickness and distemper thereby occasioned, did then and there die." The third count charges, "that the said Jane a slave, and the property of said Henry Brite, as aforesaid, on the eighth day of December, in the year of our Lord one thousand eight hundred and thirty, at the county of Callaway aforesaid, gave and administered to her infant child called Angeline, certain medicine called laudanum, against the form of the statute," &c. A motion was made in arrest of judgment and overruled by the Circuit Court. The reasons then urged, are now with some others, assigned for error.

The first nine errors are assigned to the defects in the caption of the indictment, as same appears in the record, which has been most awkwardly and imperfectly made

Jane (a slave) v. The State.

up by the Clerk of the Circuit Court; and are expressly waived by the counsel for the plaintiff in error, to avoid the delay which would attend a *certiorari*.

The tenth error assigned is, "that in neither count of said indictment, is the word 'Callaway' averred immediately before or after the averment, that the grand jury found the same upon their oaths."

Eleventh. Because the first count in said indictment, is repugnant as to time, in this, that after several different days are mentioned, the venue is laid "then and there," to a material allegation in said count.

Twelfth. Because it is not averred in the said first count, that the wrapping up, &c., was done with an intent to kill and murder, neither is it averred that the mixing and giving the poison, &c., was done with intent to murder, &c.

Thirteenth. Because the third count does not pursue the words of the statute.

Fourteenth. Because the words "then and there" are not inserted immediately after the words "Callaway aforesaid," in the third count.

Fifteenth. Because it does not appear by the first count, that the defendant was of the county of Callaway.

(63) Sixteenth. Because there is no venue laid in the following sentence in the first count, "wilfully, feloniously, and of her malice aforethought, gave to her said infant child, Angeline, to take and drink."

Seventeenth. Is a general assignment.

The tenth error assigned has no foundation. The county sufficiently appears without repeating the name of it, after the averment, and that the grand jurors were of the county of Callaway.

The eleventh error assigned seems well founded, and is fatal to the first count of the indictment. It is clear law, and has been so adjudged by this Court: 2 vol. *Mo. Rep.* p. 228, *State v. Hardwick*. That if the facts be stated as to time or place, with repugnancy or uncertainty, the indictment will be bad; and if two times or places have been previously mentioned, and afterwards a part is only laid, "then and there," the indictment is defective, because it is uncertain to which it refers; and it is no answer to the objection to say, that "then and there" will refer grammatically to the last antecedent, time and place. It must be certain to every intent. This is peculiarly the doctrine in capital cases, and felonies of a high grade. The averments "that the said Jane then and there with bed clothes," &c., and that "the said Angeline was then and there choked," &c., and "did then and there die," after having mentioned several days, without saying on the day last aforesaid, or referring to the precise day, are too uncertain. The first count of the indictment is therefore defective. This decision of this point will make it unnecessary to notice the other objections urged to the first count.

On the third count the question arises, whether the prisoner should have been charged to have administered the medicine feloniously. The words of the law are, "that if any slave shall prepare, exhibit, or administer any medicine whatsoever, he, she or they so offending shall be adjudged guilty of felony, and shall suffer death."

There is no proposition more clear in law than that in all indictments for felony; the indictment must charge the act to have been done feloniously, or with a felonious intent: see 4 *Blackstone Com.* 307; 1 *Chit. Crim. Law*, 199. That is not done in this case. The statute expressly declares the act to be felony, and then goes on to say, that if it shall appear to the Court on the trial that the medicine was not administered with an ill intent, the prisoner may be acquitted of the felony and

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found guilty of a misdemeanor. This provision clearly shows, that the law makers intended that for administering medicine, the charge must be made that it was done feloniously, otherwise how could they expect the prisoner to be acquitted of a charge not made in the indictment.

If we give this act the construction contended for by the Circuit Attorney, we believe that at this time almost every slave in the State is guilty of felony. No one by this construction could, without subjecting him or herself to the punishment of death, give even an anodyne to a restless or sickly child, unless indeed the ignorant and helpless mother could show that it was done with no ill intent. This would be requiring the most helpless and ignorant portion of our population to prove themselves innocent before they are proved guilty, or even charged with a wicked intent.

The third count is therefore bad. But there is another ground of objection to the third count of the indictment, on which we have much doubt, which arises out of the 27th section of the 3d article of the Constitution of this State, which says that a slave convicted of a capital offence, shall suffer the same degree of punishment, and no other, that would be inflicted on a free white person for a like offence. Whether this means that the same acts, which are made capital with respect to a free white person, and none other, shall be punished with death, when committed by a slave, or whether it means that the same mode of death, say hanging or burning, shall be alike common to a free white person and to a slave, when capitally convicted, is the question.

The judgment of the Circuit Court is reversed.

Decisions of the Supreme Court of Missouri.

FAYETTE DISTRICT, DECEMBER TERM, 1831.

HUTCHISON v. PARTICK.

1. Plea of payment to an action of debt founded on a judgment rendered in the State of Kentucky, properly puts in issue the law of Kentucky, and the plaintiff will be required to reply to it.
2. In an action of debt on a judgment, the plaintiff introduced in his declaration the name of the Judge before whom the declaration was rendered, but the judgment offered in evidence did not contain the name of the Judge before whom it was rendered; held not to be a material variance.
3. In authenticating records, the certificate of a presiding Judge of a Court that he himself is the presiding Judge, is good evidence of the fact.

ERROR from the Howard Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Hutchison sued Patrick on a judgment obtained in Kentucky. By leave of the Court the plaintiff amended his declaration by inserting the word "said" before the words "Garrison Patrick." The defendant then filed the pleas of *nul tiel* record and of payment to the declaration. The plea of payment contained an averment that in the State of Kentucky the plea of payment was good to a declaration in an action of debt, founded on a judgment. Issue was joined on the first plea, and the plaintiff moved the Court to strike out the second, which was accordingly done. The defendant claimed a continuance on account of the plaintiff's amending his declaration, and the Court not allowing it, judgment was had at the same term on the first plea, viz: *nul tiel* record. It is assigned for error:

First. That the plea of payment was stricken out.

Second. That the cause was not continued.

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(66) Third. That the judgment offered in evidence varied from that declaration.
Fourth. That the record was not duly certified.

Fifth. That it does not appear by the record produced in evidence, that the defendant had notice of the action in Kentucky.

First. It was contended by the defendant in error that the plea was bad, first, because it was no bar to an action on a judgment, that matter not being regulated by the law of Kentucky; and, second, because the plea presented two facts to be found by the jury. It is our opinion that the two facts constitute only one defence. It becomes then necessary to inquire whether the plea of payment can, under any circumstances be a good bar to an action of debt on a judgment.

The case of Hampton and McConnel, decided in the Supreme Court of the United States, on a writ of error to the Circuit Court of the District of South Carolina, in our opinion is in point. In that case McConnel, the defendant in error, declared against the plaintiff in error in debt, on a judgment of the Supreme Court of the State of New York; to which the defendant below pleaded *nil debet*, and the plaintiff below demurred. The Circuit Court rendered a judgment for the plaintiff below, and thereupon the cause was taken up by writ of error to that Court. The Chief Justice, delivering the opinion of the Court, said this is precisely the case of Miller. Durgee. The doctrine there held was, that the judgment of a State Court should have the same credit, validity and effect, in every other Court in the United States, which it had in the State where it was pronounced. And that whatever pleas would be good to a suit theron in such State, and none others, could be pleaded in any other Court of the United States. The judgment of the Circuit Court was affirmed, the plea of *nil debet* in such case not good in the State of New York. This decision we regard as a true exposition of the 1st section of the 4th article of the Constitution of the United States, and of the acts of Congress on that subject, and so far obligatory on (67) us. The law of Kentucky not being judicially known to us, was properly put in issue by the plea, and the Circuit Court of Howard county should have required the plaintiff to reply to the plea of payment, such as it was.

Second. In the second assignment of error, we cannot see that the Court has abused the discretion which the 19th section of the act to regulate proceedings at law has allowed it to exercise. The insertion of the word "said" before the name of the plaintiff in error in the declaration, could have been no surprise to him; he must have been morally certain that he was the person intended before the declaration was amended.

Third. The assignment is that the judgment offered in evidence varied from that declared on. The judgment offered in evidence is in these words: therefore it is considered by the Court that the plaintiff recover, &c. The declaration alleges that the plaintiff, before the honorable Benjamin Shackleford, by the name and description of B. Shackleford, presiding Judge of the Circuit Court within, &c., by the consideration and judgment of said Court, did recover, &c. By resorting to what the counsel for the plaintiff in error calls the Clerk's preamble, and to the signature of the presiding Judge, which we consider a part of the record, we are certain that Benjamin Shackleford was Judge of the Court which rendered the judgment, and also that he was presiding Judge; and of his being presiding Judge of that Court, his own certificate is good evidence, inasmuch as the act of Congress requires the presiding Judge to certify that the person who made out the record was Clerk. The declaration would certainly have been as good had the plaintiff below been content,

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to say nothing about the name of the Judge of the Court, and the introduction of it has answered no purpose whatever.

In support of the fourth assignment of error, viz: that the record was not duly certified, the plaintiff in error has said nothing, and perceiving no defect in the certificate, we also will pass it over.

The fifth assignment of error is, that the plaintiff in error had no notice of the (68) action in Kentucky. By the Sheriff's return, it appears that he was taken on the *capias*, issued on the declaration, and gave bail. This Court conceiving that the Circuit Court erred in striking out the defendant's plea of payment, reverse the judgment of that Court for that cause only, and remand the cause for further proceedings in conformity with this opinion.

3	68
40a	238
3	68
136	307
3	68
144	642

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172 2646

1. The Constitution of the State, and the statute organizing the Circuit Courts, are the Judge's warrant for holding Courts and taking jurisdiction in capital cases.
2. It is not necessary that a *venire facias* should issue to the Sheriff to summon a jury before he can proceed to do so; nor need one be awarded on the roll.
3. Objections to the officer returning a jury should be taken before the trial commences, and cannot be taken advantage of in arrest of judgment.
4. In the Boone Circuit Court a jury was empannelled to try a prisoner. The trial was unfinished on Saturday evening. The Monday following the Howard Circuit Court was to commence. Both Courts were held by the same Judge. The Judge ordered the Sheriff to adjourn the Boone Circuit Court on Saturday evening until the Monday following, and to proclaim that on the Monday following a special term of the Boone Circuit Court would be held in continuance of the regular term, to finish the trial of the prisoner. This proclamation was made. On the following Monday the special term was held, and on Tuesday the trial resulted in a verdict of guilty, and sentence of death was pronounced against the prisoner. Held that the special term was lawfully holden.

ERROR from the Circuit Court of Boone county.

MPGIRK, C. J., delivered the opinion of the Court.

The plaintiff was indicted for murder in the Ralls Circuit Court, at the February term, 1830. At that term the prisoner was arraigned and pleaded not guilty. He then applied for and obtained a change of venue to the Boone Circuit Court. When the cause came there, the change of venue was deemed incomplete, and the Court of Boone sent the prisoner back to Ralls Court. At the Feb. term of that Court, 1831, the

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cause was continued till the first Monday in April, to which time the Court adjourned 69) their general term, to hold a special session in continuance of the term of Feb., at which time the Court opened and amended the record of the charge of venue, and sent the prisoner back to Boone county to be tried. At the June term of the Circuit Court for Boone county, 1831, the Court proceeded to try the prisoner, and having a jury empanelled on Saturday evening, the trial was not ended. The Judge made an order to the Sheriff to adjourn the Court till Monday morning, and to proclaim that on Monday a special term of that Court would be held in continuance of that term to finish the trial of the prisoner; which proclamation was made. On Monday the Court was held accordingly, and on Tuesday the trial resulted in a verdict of guilty. Sentence of death was pronounced. The same Monday was the day appointed by law for holding Court in Howard county, by the same Judge. The prisoner has brought his cause to this Court, by a writ of error, and assigns on the record several errors, some relating to the caption of the judgment.

The first is, that it does not appear that the Judge who held the Court, had power to hold that Court, not having been assigned to do so. There is nothing in this objection. The Constitution of the State, and the statute organizing the Circuit Courts, are the Judges' warrant to hold Courts, and take jurisdiction in capital cases.

The second objection is, that it does not appear by the record, that a *venire* issued to the Sheriff of Boone county to summon a jury, nor does it appear who summoned the jury in the case. Some other minor objections were made to the indictment, but were properly abandoned on the argument.

The points assigned for error, and relied on in the argument, are stated as follows, to wit:

First. There was no *venire* to the Sheriff of Boone county, to summon the jury that tried the prisoner.

Second. The proceedings of the Ralls Circuit Court, had on the first Monday in April, are void, there being no record of any legal adjournment to that time, and no general law authorizing a Court to be held at the time.

(70) The adjourned term of the Boone Circuit Court at which the prisoner was tried, was held without law, and the proceedings had therein are void.

We will proceed to consider the first point. Is it necessary by the laws of Missouri, that a *venire facias* should issue to the Sheriff to summon a jury before he can proceed to do so? Must it appear by the record that a *venire* was awarded? Mr. King, for the plaintiff, insists that it was in general necessary at common law, that a *venire* in criminal cases should be made out to the Sheriff before he could summon a jury, and that the award thereof should appear on the record. To prove this, he cites 18 *Johnson's R.*, 212, and the authorities there cited. We have not got the book before us, but if we recollect correctly, the decision is, that a *venire* is necessary in N. Y.; though they say they cannot see much use in it at this day. To support the point, the counsel have also cited 1 *Chit. Crim. Law*, 50, C; 3 *Bac* title *juris*, letter B. 1. These authorities prove, that by the course of proceeding at common law, some of the English Courts did use the *venire*, and others did not. Both the books say, that Justices of gaol delivery did not use the writ of *venire*. That Justices of the Sessions used no *venire*. *Chitty* says, that it was laid down by *Lord Ch. J. Treby*, to be the law with regard to Courts of gaol delivery. That before the coming of the Judges, they issued a general command in writing, under their hands and seals, to the Sheriff, commanding him to return a jury at the time and place of hold-

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ing Court; which the Sheriff executed, and his return thereto was, that he had executed the precept with the panel thereto annexed. 1 Chit. Crim. Law, 515. This panel is simply filed in Court, and the Sheriff's name is not signed thereto, and a jury is taken therefrom as necessity may require. Ibid. 507. In the Courts of *Oyer* and *Terminer*, the Justices use no *venire*, but make their command in writing, under their hands and seals, to the Sheriff to return a jury. 3 Bac. 728, title *jury*, letter B. 1. And in page 729 of that book, it seems the course is to use the *venire* in the Exchequer and K. B. But in the K. B. if the first *venire* failed of effect, the Sheriff (71) made up the deficiency, by the bare verbal order of the Court. It is further laid down in 1 Chit. Crim. Law, 508, that when the first panel under the general precept is exhausted, the Justices of gaol delivery award a new panel *ore tenus*, returnable *instanter*. This doctrine is supported by a case in *Foster's Reports*, 25 and 64. This appears to be the common law doctrine of England, adopted in Missouri in the year 1816. We ask which of those English Courts is our Circuit Court most like, and which is it bound to follow? We are of opinion it is bound to follow neither of them. We are of opinion that the doctrine of *venires* as known to the common law, never was the law of this country. The statute adopting the common law, forbids the introduction of all such portions of it as may conflict or be inconsistent with the statutes of the country then in force. In 1811, the Legislature passed an act, which says, "the several Courts before whom juries are required, are hereby authorized to direct the Sheriffs to summon a sufficient number of persons to perform the duties of jurors. The second section provides a penalty to be imposed on persons being summoned and failing to attend. When this statute was passed, the common law was not the law of this land. At that time no question of this kind could arise. The general practice of the Courts was to direct the Sheriff from time to time *ore tenus*, to summon a jury as occasion might require. Thus stood the law and the practice under it in 1816, when the common law was adopted. The practice still continued the same, with only a few exceptions, till 1825, the time of the passage of the present jury law; and since that we are not aware of any alteration in the practice. The act of 1825 is nearly the same in terms as that of 1811. See Rev. Code, 466. It is an act entitled an act concerning grand and petit jurors, the first section of which provides: That the several Courts before whom juries are required, are hereby authorized to direct the respective Sheriffs to summon a sufficient number in persons to perform the duties of jurors. See Revised Code, Laws of Missouri, 466. The act says, the Courts may direct the Sheriff to summon jurors. It does not say how (72) the direction is to be given, whether by an order made of record to stand as a general order, or by a writ under the seal of the Court, called a *venire facias*, or by an order under the hands and seals of the Judges, or by a bare command *ore tenus*.

We perceive no reason why either of these modes would not be good. If the Judge, sitting in his place as a Judge, gives a verbal order or command to the Sheriff to summon a jury to try a prisoner, the Sheriff is bound to obey. There can be no possible use in having the command entered of record. But it is argued that there is a necessity to have entered on the record the command to the Sheriff to return a jury, because if the jury should be returned by any other person than the Sheriff, the prisoner might not have an impartial jury returned by an impartial officer, and because in this case it does not appear who returned the jury, it is error. By the jury act of 1825, it is the general duty of the Sheriff to summon juries, when directed by the Court to do so. But by the other statutes, the Courts may direct the Coroner in cer-

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tain cases to summon the jury. In this case it appears by the record, that a good and lawful jury came, and in the presence of the prisoner were sworn and entered on the trial. And no objection being made by the prisoner to the returning officer or the array, we must suppose he was satisfied with both. If the fact was that the Coroner returned the jury, or if the Sheriff was not impartial, there is a mode of taking advantage of those things by challenging the array, before the trial is gone into. 1 *Chitty* 515 and 548. The challenge to the array, for partiality in the returning officer, must be made in writing, *ibid.* 547. The challenge may be demurred to and thus become a part of the record, *ibid.* 548. But every objection to the Sheriff, and we presume to every other officer returning a jury, must be taken before the trial commences, and cannot be taken advantage of in arrest of judgment, *ibid.* 516, 1 *Leach* 101. For these reasons we hold no *venire* is necessary by our laws, consequently none need be awarded on the roll; and if a *venire* were necessary, yet we would hold that the English entry of "thereupon let a jury come," is unnecessary where (73) the prisoner pleads not guilty, for by the constitution, the prisoner is entitled to a jury and the award of a *venire*, or "thereupon let a jury come," could make his right to a jury trial no more certain nor strong than it would be without it. If it is true, as the prisoner's counsel contend it may be, that some other person than the Sheriff summoned the jury, he has lost nothing, for there was a time when, and there is a mode of taking advantage of that, if it existed, and if the prisoner did not do so, he cannot now avail himself of it. The first point is overruled.

The second objection is that which relates to the adjourned term of the Circuit Court of Ralls county. The prisoner's counsel did not press this point, but seem to consider it conjointly with the third objection. We will take the same course with it.

The third objection is, that the Circuit Court for Boone county could not lawfully hold an adjourned term of the June regular term for that county, on the day it did hold Court, because on that day the law required the same Judge to hold, or to begin to hold, a Court in Howard county. Messrs. Gordon and King for the prisoner contend, that the holding the adjourned term on Monday did interfere with the Court to be holden in Howard county on the same day, and that every thing done therein was void, because they say the law had directed the Judge to be at Howard on that day, and to hold Court, and he could not be in both places at the same time; and his first duty was to hold Court in Howard. Their argument farther is, that when the law says, Court shall be holden on a certain day in Howard county, it forbids the Judge from holding Court elsewhere on that day.

The Attorney General on the other side, contends, that whether there was an interference or not, this Court cannot know. That the law intends to guard against an interference in fact, and whether that will take place or not, must be left to the Judge to decide, who has a knowledge of the general state of the docket in his circuit. And he farther contends that if there should be an interference in fact, it will not (74) avoid that which was done at the adjourned term. By the 20th section of an act passed by the Legislature the 7th of January, 1825, it is provided, that the Judges of the several Courts hereby established, shall, when necessary from sickness or other unavoidable cause, or for dispatch of business, hold special adjourned sessions of their respective Courts in continuation of any regular term, and for that purpose may at any time in term, adjourn to any day antecedent to the next stated term of such Court, so as not to interfere with any other Court to be holden by the same Judge,

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and such special adjourned session shall be held accordingly, and be deemed and considered to all intents and purposes a continuation of the regular term, and all process shall be returned, and all persons held to appear accordingly. The Circuit Court of Ralls county, at their February term, 1831, adjourned the Court till the first Monday in April, on which last day no Court was required to be holden by the same Judge, at which time the Court amended the record, as to the change of venue. We cannot see any claim of interference in this matter. This point is overruled. The above 20th section provides for an adjourned term to be made by the Court in term time, for three general causes: first, if the Judge, during Court, became sick; second, if unavoidable accidents should happen so that the business of the Court cannot go on, and thirdly, if the Court should be of opinion that the dispatch of business be promoted, it may create a special term. In all these cases the Court is made the judge, whether the things authorizing a special Court to be holden, do exist, and when the Court has so decided, and ordered the special term to be holden, all acts done at such special term must be good, whether the Court did right or wrong in deciding that the contingency had arisen; otherwise the rights of property would rest on no foundation at all. The 21st section of the act provides for other cases than those in the 20th section. The first of which is, that if the Judges do not appear and hold their Court on the first day appointed by law for holding Court, the Court shall stand adjourned from day to day, until the evening of the third day, and if before that time (75) the Judges do not open Court, the Court shall stand adjourned till the next regular term. These three days are no doubt given to provide against accidents that may befall the Judges in traveling to the place of holding Court. The next case the section provides for is, that when the Court has commenced, if the Judge be unable to be in Court, and shall fail to appear at the appointed time and hold Court, in that case the Court shall stand adjourned from day to day, until the evening of the third day, unless the Judge within that time shall appear and go on with business; otherwise the Court shall stand adjourned until the next term. The section then provides that it shall be lawful for the Judges in any of the cases aforesaid, before their Courts shall be finally adjourned as aforesaid, to make an order in writing to the Sheriff of the county, where the Court is to be holden, commanding him to adjourn the Court to the next regular term, or to any day antecedent thereto, as may seem expedient, so as not to interfere with any other Court to be by the Judge holden, which order shall be recorded, &c. That authorized by the 20th section is to be done in Court, except so far as the next section extends the power farther. That authorized by the 21st sec. may be done at any time before the Court day arrives; and when there is no Court in fact, it may be done by anticipation in any of the aforesaid cases. We think the words in any of the aforesaid cases, in the 21st section, refers as well to the cases in the 20th section, as to those in the 21st section. If then, while the Court was in session in Boone, the Judge thereof deemed it expedient for the dispatch of business in that Court to create a special term on Monday following, to be holden there, he had the power to do so, and he might by law send his order in writing to the Sheriff of Howard, to adjourn that Court to any day antecedent to the next regular term, and if the Judge did do so, there would be no interference. But whether this was done or not, it cannot judicially appear by this record. The Judge, therefore, had it in his power by the act, to push the Howard Court out of the way of holding Court (76) in Boone on Monday. We are, therefore, of opinion, that it is the duty of the Judge to arrange his special terms, so as to give each county a due share of judicial

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time. And if this discretion is abused wantonly, surely it cannot be a cause for reversing the judgments of the Court; but the Judge would be answerable in person to the country. The special terms are to be so ordered as not to interfere with other Courts, to be holden by the same Judge. In the case before us, what ought the Court to have done? It appears by the record that when Saturday evening came, the trial was not finished; a jury was charged with the case, the trial not finished, and Court was to be holden on the next Monday at Fayette, in Howard county, by the same Judge. In England, by the old law, the Judge was authorized to employ carts and oxen, to carry with him the jury, until they agreed. This doctrine is not the law of this country. By the 10th section of the 13th article of the State constitution, it is provided, "that if in any criminal case the jury be divided in opinion, at the end of the term, the Court may in its discretion discharge the jury, and commit or bail the accused." But this is discretionary with the Court. How the fact was in this case we do not know: the jury might have been divided in opinion, or the evidence might not all have been yet given. Suppose this was the case, and many and distant witnesses attending, it would then become the duty of the Court to consider whether any mode was or was not provided by law for such a case. Surely no Legislature, feeling for the interest of country, and willing to do its duty, could fail to provide a remedy for such a case, if they should once happen to think of it. The Legislature have thought of the case, and provided the remedy, which the Judge has applied in this case. The Court could not with propriety nor with justice to the prisoner, witnesses, and jurors, have postponed the Court, till the business of his whole circuit could be got through with; and as the Attorney General has aptly argued, no time could have been fixed upon that might not have interfered with some of the Courts, in some of the counties. If the special Court had been put beyond the week of the (77) last Court in the circuit, yet the Court could not know in advance positively that the business of that Court would not require all the time intervening, till the commencement of the regular circuit again. The Court in this case did nothing more than that which it might lawfully do. But it is argued, that there could be no judicial time in Boone, after the first week had expired, because the Legislature had positively said, that on the next Monday judicial time should begin in Howard county. It is true that the first part of the act fixing the times of holding Courts, says the Court shall be holden in Howard on the day on which the special Court was holden; but a subsequent part of the act says, if the Judge should be sick, or if any other great unavoidable accident should happen, or if the Judge should clearly see that business would be more despatched at another time, then if the Judge shall so order it, the Court shall not be then holden, but shall be holden at such other time, which time shall be made public, &c. We cannot see how the failure, the total failure to hold court in Howard county, could possibly prejudice this man. The Court then had nothing to do with his rights, nor with his case. This argument is, that on Saturday night the jury should have been discharged, and that he should have been sent to prison till another term. The Legislature have made the provisions in the act above referred to, to meet exactly such a case as his case was. It is asked by way of argument, if the Judge had made no order postponing the Court in Howard, could the proceedings of the special Court then be lawful? It is deemed a sufficient answer to say, that by the law and the constitution, the Court had jurisdiction of the case; and having gone lawfully into the trial, it was the positive duty of the Court to finish it in some way, and at some time, unless prevented by overbearing obstacles,

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though the legislative command to hold Court in Howard, should be entirely unattended to. Any other construction of the will of the Legislature would be to suppose them ignorant of human affairs, and to act and direct without reason or adequate motive. The counsel have cited a case from *Peck's Reports*, as being in point. (78) We consider that case unlike the present case, in this, that the act of the Legislature of Tennessee contains no provisions for holding special adjourned terms of Court.

The Tennessee act says the Court shall continue in session till all the business is done or until it shall be necessary to adjourn to go to some other Court. Nothing of this kind is found in our act. The substance of the case is, that the Circuit Court in Tennessee, began a Court in one county and held Court that week, and on Monday of the next week, which Monday was the day appointed to hold Court in another county. The judicial acts done by the Judge on Monday, were holden by the Supreme Court of Tennessee to be void. We do not like that decision, and if our statute were exactly like that of Tennessee, we believe we would object to the reasons and grounds on which the case is made to rest.

Judgment affirmed.

WASH, J., dissents from the foregoing opinion, on the third point adjudged.

Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, DECEMBER TERM, 1831.

BOYNTON v. REYNOLDS.

1. The plea of *nil debet* to an action of debt on a specialty will be held bad on demurrer.
2. A note with a scrawl annexed by way of seal, will not be considered a specialty, unless some expression in the body or testimonium of the note itself, shows that the maker intended it to be taken as a specialty. (Note a.)

ON ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action commenced in the Circuit Court (under the petition and summons, act. *Rev. Code* 620,) by Reynolds the defendant in error, against Boynton the plaintiff in error. The petition states that he, Reynolds, holds "a sealed note on the defendant Lewis H. Boynton, in substance as followeth: In one year we promise to John Reynolds three hundred dollars for value received this 1st July, 1828. Morris Whiteside, (seal.) Jacob Judah, (seal.) L. H. Boynton, (seal.) Yet the said debt remains unpaid, wherefore he prays judgment for his debt and damages, &c." The defendant below pleaded *nil debet*, and a special and general plea of fraud. The plaintiff below demurred to the plea of *nil debet*, and joined issue on the pleas of fraud. The demurser was sustained to the plea of *nil debet*, and the issues of fact were found for the plaintiff, and judgment rendered accordingly. To reverse which the present writ of error is prosecuted.

The only error assigned, is the rendition of the judgment on demurrer, to the plea of *nil debet*. No law is better settled than that the plea of *nil debet*, in an action of debt on a specialty, will be held bad on demurrer. It is not to be doubted but that (80) this is an action of debt, under the provisions of the act referred to; but it is

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insisted by the counsel for the plaintiff in error, that the instrument sued on is not a specialty or note under seal. The act requires that a copy of the bond or note sued on should be set out in the petition, and that the original should be deposited in the Clerk's office, &c. The copy of the note sued on appears upon the record in the form above set out. The plaintiff states it to be a sealed note, and whether the representation of the seal, as given on the record, be the *fac simile* of a mere scrawl attached to the note, or a scrawl standing in the place of a seal, impressed on wax or other tenacious substance, does not appear. Had the note been actually sealed, a copy of the seal could not have been given in any other manner; whilst on the other hand, had it been executed with a mere scrawl, not by way of seal, the defendant might have craved oyer and demurrer, thereby bringing it to the inspection of the Court, and obtaining a decision of the mixed question of law and fact, whether sealed or not. The case of *Cartmill v. Hopkins*, 2 vol. *Missouri Decisions*, p. 220, has been cited and relied on by the counsel for the plaintiff in error. The expressions used in that decision are to be understood with reference to the subject matter. The question there was, whether a mere scrawl appended to the name, without some words in the body or testimonium of the note, to evidence that it was placed there by way of seal, could be regarded as such; and the Court decided that it could not. The Court in that case say, that the doctrine in Virginia on a statute similar to our own, in regard to scrawls, seems to us the true doctrine. The maker of an instrument, (meaning clearly an instrument with a scrawl,) should show by some expression in the body or testimonium of the instrument itself, that he intended it to be considered and taken as a specialty. They did not and could not have intended to decide (as has been urged) that an instrument, with a seal formally and solemnly impressed on wax or other tenacious substance, would not be a good bond or specialty.

The judgment of the Circuit Court is therefore affirmed, with costs.

(a.) See *Grimsley v. Adm'r of Riley*, 5 Mo. R., 281.

(81)

DIVERS v. MARK, RECTOR AND ROSELT.

1. A decree *nisi*, to be made absolute on non-appearance of defendants within five years, cannot be set aside on motion either of the defendants against whom it was taken, or of others made defendants after the decree. As to those first made defendants, it can only be done by bill of review.
2. It seems that after a decree *nisi*, a person wishing to be made a defendant can be made a defendant only by an original bill in the nature of a bill of interpleader.

APPEAL from the Circuit Court of St. Louis county.

M'GIBB, C. J., delivered the opinion of the Court.

In this case Divers filed his bill of complaint against Mark and Rector, and others. As to the others, the bill was dismissed and the cause proceeded against Mark and Rector as non-residents. After an order of publication was made as the law directs, and no appearance, the Court made an order that the bill be taken as confessed against them conditionally, that if they would not appear within five years and bring their bill of review, then the decree should stand absolute. After this was done, Rosvelt petitioned the Court to be made defendant, and it was allowed on the ground that he had an interest in the matter. He then moved to set aside the order for the decree *nisi*, which was done. The order for a decree was informal, but it might have been amended afterwards *nunc pro tunc*, if the order for setting it aside had not been made. When this decree *nisi* was made, we consider the cause as at an end, unless the defendants should appear within the five years and bring their bill of review. This is the only mode of getting at this decree by the defendants: see 38th section of the act respecting chancery practice, *Revised Code*, 645. We cannot see how Mr. Rosvelt could lawfully set this decree aside on motion, when the defendants themselves could not have done so. It seems to us that his only mode of redress, if he had an interest in the matter, was by filing an original bill in the nature of a bill of interpleader; but on this point we are not very confident. It may have been right to admit Rosvelt as a defendant. But on the other point we are satisfied the (82) Court erred against the complainant. On the other points made in the cause, it becomes unnecessary to give any opinion.

The decree dismissing the cause is reversed, with costs to Rosvelt. If the complainant will not file his replication *instanter*, or within a given time, his bill should be dismissed, or the defendant may move to have the cause set for hearing, answer and exhibits. On the coming in of the replication, it would seem the defendant may, if he pleases, have a continuance.

BOTTHICK'S ADM'RS v. PURDY.

1. A note given for the payment of a certain sum *in work*, is not assignable.
2. To maintain an action on an instrument for personal services, it is necessary that a special request for the performance of the services be first made.

ON ERROR to St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of covenant commenced by Bothick in his lifetime, against Purdy, on a sealed instrument in the following words: "St. Louis, October 30th, 1820. On demand I promise to pay Elias Rector or order one hundred and eighty dollars in carpenters' work, to be valued by two disinterested persons at the St. Louis cash price, for value received of him the day and year above written, as witness my hand the day and year above written. James J. Purdy." On which was the following assignment: "Pay the within to John Bothick or order, (signed) Elias Rector." The declaration after setting forth the substance of the instrument and the assignment, avers that Bothick "afterwards to wit: on the first day of May, in the year last aforesaid, at the county aforesaid, did demand the said Purdy to pay him the sum of one hundred and eighty dollars in carpenters' work, agreeably to the terms in said writing obligatory specified," and assigned the breach in Purdy's refusal to do the (83) work. The defendant by plea denied the assignment as stated, upon which issue was taken and found for the plaintiff. The defendant then moved in arrest of judgment, and assigned as reasons:

First. That the declaration shows no legal cause of action.

Second. That the instrument declared on is not assignable by law. The judgment was arrested, and to reverse this decision of the Circuit Court, the present writ of error is prosecuted.

There is a general assignment of error. For the defendant in error two points have been presented and relied on:

First. That the writing declared on is not assignable, so as to enable the assignee to maintain an action on it, in his own name.

Second. That there is no cause of action set out in the declaration, because no sufficient demand is alledged.

On both points the law is clearly with the defendant. As to the first point made, the statute in force at the time of the execution and assignment, (*Geyer's Digest*, p. 66,) provides "that all bonds, bills, and promissory notes, for money or property, shall be assignable, and the assignee may sue for them in the same manner as the original holder thereof could do." In the present case the obligation is not for the payment of money. The words "one hundred and eighty dollars," are used merely to fix the amount of work to be done by the defendant. Nor is the contract for property, but for personal services only. Such an instrument at the common law had no assignable quality, and our statute gives it none. As to the second point, a special request was clearly necessary, and that too according to the sense of the con-

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tract. It should have been averred with time and place, that Purdy had been requested to work at some particular description or job of carpenters' work. The judgment was therefore properly arrested by the Circuit Court, and its decision on the motion in arrest of judgment is affirmed with costs.

(84)

S. AND J. BELL v. THOMPSON AND THOMPSON.

A debtor may prefer one set of creditors to another, and he may convey his property in trust for the benefit of one set in exclusion of the rest. (Note a.)

3	84
123	321
3	84
123	494

ON ERROR to St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

The plaintiffs sued P. R. Thompson on a promissory note, and summoned R. C. Thompson as garnishee, in whose hands a large amount of merchandise was attached as the property of P. R. Thompson. Judgment was rendered without opposition against the defendant, for the amount of his note and interest. Interrogatories were exhibited to be answered by the garnishee, touching the property of the goods attached; who admitted a large amount of goods in his hands which had once belonged to the defendant, P. R. Thompson, but insisted that they had been regularly and *bona fide* conveyed to the garnishee and one Anderson, as trustees of the defendant, for the purpose of paying said trustees certain security debts, and for paying certain other creditors of the defendant, not mentioning the plaintiffs. The plaintiffs counterpleaded to the answer of the garnishee, and alledged that the deed of trust was fraudulent and void, and conveyed no title. On this allegation issue was taken, and under the instruction of the Court was found by the jury for the garnishee, and judgment was thereupon given. To reverse which the plaintiffs have brought this writ of error.

From the evidence preserved by the bill of exceptions, it appears that at the time P. R. Thompson executed the deed of trust, he was in failing circumstances, and unable to pay all his debts; that the debts mentioned in the deed of trust were *bona fide* due, and that the trustees themselves were creditors and securities of the defendant. At the trial various instructions were moved for by the plaintiffs' counsel, which the Court refused to give, and which it seems unnecessary to notice in detail.

They are all resolvable into this single proposition, to wit: whether P. R. Thompson (85) son, the defendant, being in failing circumstances, and actually sued for a just debt by the plaintiffs at the time he made the deed of trust under which the gar-

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nishee claims, could or could not by law prefer one set of creditors to another, and so convey his property in trust as to exclude the plaintiffs.

Upon this question the law is believed to be well settled for the garnishee. The cases cited from 15 *John. R.* 571; 8 *T. R.* 420; and 8 *T. R.* 528, discuss fully and establish clearly the principle "that it is neither illegal nor immoral to prefer one set of creditors to another." Such a preference of itself furnishes no ground from which to infer fraud, and in this case there is nothing shown but the preference given some of the creditors over the plaintiffs, from which it can be inferred that the parties, at the time of making the deed of trust in this case, intended to defraud the plaintiffs. The deed contains no clause or power of revocation; makes no provision whatever for the grantor; is unrestricted in its terms; accompanied with a delivery of possession; is intended to provide for the payment of debts *bona fide* due, and must be adjudged good and effectual in law.

The cases cited and relied on by the plaintiff's counsel, are clearly distinguishable from the one now before the Court. In the case of *Burd v. Smith, lessee, &c.*, in 4 *Dall.* p. 80, the deed contained specific conditions and stipulations, such as, that it should be available for those creditors only, who in nine months thereafter should signify their acceptance of the interest conveyed under it; and that the Trustees should pay to one of the grantors, his executors, administrators or assigns, the proportion of all such creditors as should not signify their acceptance within the time specified, &c. From the very terms and operation of the deed, an interest was reserved for the debtor, and this formed the strong ground in argument. The deed was not made to creditors, but to strangers of the debtors own nomination, who paid no consideration. The whole estate conveyed was conditional, and the deed itself was not delivered until after judgment and execution, which gave a lien. The case (86) of *Hislop and Campbell v. Clark and others*, 14 *John.* p. 458, was one in which the deed was made, on condition that the creditors should grant a discharge to the debtors, and to be and become null and void, if the creditors or any of them should refuse to give a discharge; and provided a resulting interest to the grantors. The case referred to in Peters' condensed reports, 321, settles the principles against the doctrines contended for by the plaintiffs' counsel. The cases, so far as they have been examined, are in many essential points very unlike the one before the Court, and easily distinguishable from it, in the application of those principles which are too well settled to be now questioned, and upon which it is adjudged that the decision of the Circuit Court be affirmed with costs.

- (a.) See *post Deaver v. Savage*, 253.
Sweringen v. Slicer, 5 Mo. R., 243
Brown v. Knox et al., 6 Mo. R., 302.

BENJAMIN AND WIFE v. BARTLETT.

3	86
111	133
51a	200
3	86
196	46

1. Where the cause of action accrues against the Wife while sole, the suit is properly brought against both husband and wife; but the husband alone has power to make an attorney for the wife
2. A judgment given to bear interest at the rate of ten per centum per annum, is erroneous.

ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

Bartlett the defendant in error brought suit against Benjamin and Wife in the Circuit Court, to recover the amount of money due from the wife before her intermarriage with Benjamin, for work and labor done for, and materials furnished to her whilst sole. At the term to which the writ was returnable, the plaintiffs in error, (then the defendants in the Circuit Court,) appeared by their attorney in fact, under a power executed by them for that purpose, and confessed a judgment for two thousand two hundred and eighty-eight dollars, fifteen and one half cents, to bear an interest at the rate of ten per centum per annum until paid, which was so entered up (87) by the Court. We can look no further on the present writ of error.

The motion subsequently made to set aside this judgment and the proceedings and judgment thereon, cannot now be considered. The writ of error has removed the record in the original suit only, and we shall confine ourselves to that. Two of the errors assigned, have reference to this record.

First. That judgment was rendered against the plaintiffs in error, (of whom one was a *feme covert* at the time,) under and by virtue of a power of attorney, (which the *feme covert* could not legally make,) and

Second. That the judgment is given to bear an interest at the rate of ten per centum per annum until paid.

As to the first point, the cause of action having accrued against the wife while sole, the suit was properly commenced against both husband and wife; and the husband alone had power to make an attorney for her, see 1 Bac. 296, 2 Saunders 213, 6 Mod. 86. The fact of her having joined with her husband in the power, will not impair its validity. As to the husband the judgment is good; its effect upon the property or rights of the wife is another matter, and need not now be considered.

On the second point, the law is with the plaintiffs in error, and the judgment of the Circuit Court must be reversed with costs. It is expressly provided by statute, "that judgments recovered in any Court of record, shall carry an interest at the rate of six per cent. per annum only." Conventional interest at the rate of ten per centum is lawful, whilst the matter is between the parties contracting, and we do not intend to decide that where the contract carries ten per cent., the judgment should not execute the contract; but this is not such a case.

This Court proceeding now to give such judgment as the Court below should have given, do order and adjudge that the plaintiff Bartlett, recover against the defendants

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in the Circuit Court, the sum of two thousand two hundred and eighty-eight dollars fifteen and one half cents, with interest thereon at the rate of six per centum per annum, since the rendition of the judgment in the Circuit Court.

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(88)

SCOTT & RULE v. HILL & McGUNNEGLE.

1. It is not error to give judgment against a garnishee for more than the amount of the plaintiff's judgment against the defendant.
2. A promissory note made payable to order is such property as can be attached.
3. But to entitle the plaintiff to a judgment against the garnishee, in such case, he should first prove that the defendant was still the holder of the note. (Note a.)

ERROR to St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was a suit commenced by the defendants in error, Hill & McGunnegle, by attachment against Oliver Hudson. The writ was served on William K. Rule, of the firm of Scott & Rule, on the 24th day of August, in the year 1830, as garnishee. Interrogatories being filed, Rule answered for himself and Scott his partner, and stated that he was the acting partner of said firm; that on or before the 20th July, 1830, the said Scott & Rule purchased at auction and private sale, goods, wares and merchandize of said Hudson, to the amount of one thousand three hundred and forty dollars and thirty-nine cents, for which sum they, on the second day of August, in that year, executed their promissory note, (ante dated 20th July, 1830, to correspond with the date of the purchase,) payable to the order of Jabez Warner, at the office of discount and deposite of the Bank of the United States, at St. Louis, three months after the date thereof; that said Warner for the accommodation of Scott & Rule, endorsed said note in blank, and that they delivered it to Hudson in payment for the goods purchased as above mentioned. Some few days after, Hudson absconded, taking with him, as Rule says he believed, the said note; that it appears the said note was afterwards endorsed by Hudson or some other person, and discounted or deposited in the branch Bank of the United States at Boston; that he knows not whether Hudson parted with the said note for a valuable consideration, but thinks it probable; that when said note became due, viz., on 23d October, 1830, it was in the possession of the said office of discount and deposit in St. Louis, and that they still owe the said (89) amount to somebody, and pray the Court to say what is the law in such cases, and to whom they may safely pay the money, and denies having any property of Hudson, or owing him any thing other than as above mentioned. The Circuit Court

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rendered judgment against the garnishees, Scott & Rule, for \$1340 39, the whole amount which they owed Hudson: and the amount of the judgment which the plaintiffs in the action, Hill & McGunnegle, had obtained against Hudson, the defendant, is but \$560 27. It is contended that there is error in the judgment of the Circuit Court:

First. In giving judgment against the garnishee for more than the amount of the plaintiffs' judgment against the defendant.

Second. That the plaintiffs ought to have shown, that at the time of the attachment of the debt by Hill & McGunnegle in the hands of the garnishees, Hudson had not transferred the note to any other person.

Third. That the note in question being negotiable, "is not the subject of attachment as against third persons to whom it had been passed by Hudson, without notice whether before or after the attachment served."

First. The counsel for the defendants in error contends, that the judgment of the Circuit Court was rightly given for the whole sum found to be due from the garnishee to the defendants, because the defendants might perhaps be insolvent, and that in such case the plaintiffs might not be able to obtain the whole of their demand, and would be in no better situation than other creditors."

The ninth section of the attachment law requires, that in case the plaintiff deny the truth of the garnishee's answer, the Court or a jury, if one be required, shall inquire what is the true amount due from the garnishee to the defendant, &c. And that the Court, if the finding be against the garnishee, shall grant judgment against him in favor of the plaintiff, for the whole amount of the debts found to be due from him to the defendant, and the moneys, and the value of the goods and chattels, and effects, found or acknowledged to be in his possession, belonging to the defendant, with the (90) costs of such inquiry. Although it cannot for a moment be admitted, that the legislative power intended that the plaintiff should recover from the garnishee more than he was entitled to receive from the defendant, yet it is plain that it is intended that the whole of the debts due from the garnishee to the defendant, as well as the value of the goods and chattels, found or acknowledged to be in his possession belonging to the defendant, is to be subjected to the payment of the plaintiff's demand; but whether the demand of the plaintiffs is to be satisfied out of this fund to the exclusion of other creditors, is not necessary now to be said, inasmuch as there are no other claimants before the Court. The Court will not presume, that the note executed by the garnishee to the defendant, is worth less than its nominal value. The judgment of the Circuit Court then in this particular, appears to be correct, and the point is ruled for the defendants in error.

Second. This point and the third, may perhaps be disposed of more easily together than separately. In support of the ground here assumed, it is urged by the plaintiffs in error, that it is impossible for them to know whether at the time of serving the attachment they were indebted to the defendant Hudson, that he might have instantly parted with his interest in the note which they executed and delivered to him; that, therefore, the plaintiffs ought to have proved that the note was not assigned at the time when the attachment was served, and it was further contended that it could not have been the intention of the legislative power to subject this kind of paper to attachment; this paper being transferable by delivery, and the maker of the note being by the law of the land, (for the law merchant has been decided to be such,) liable to the holder. The duty of the Courts is so to construe the laws of the land, that if

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possible they may all stand; but if they cannot all stand, the last expression of the legislative will must stand good, and the former must yield. Another rule of construction is, that when the common law, and a statute law conflict, the common law must yield. It never could have been the intention of the Legislature, that the maker (91) of a promissory note, whether transferable by assignment or delivery, should be held liable to pay the money to both the holder and the plaintiff in attachment. It remains then to inquire whether the terms used in the statute are sufficiently comprehensive to embrace this kind of property. The words used in the first section of the attachment law are, "attach the said defendant by all and singular his lands and tenements, goods, chattels, moneys, credits and effects." The terms are, we think, sufficiently comprehensive to embrace the note in question.

It being settled that the debt due by this note is such property as can be attached, the next question that arises is, whether the plaintiffs have given such evidence of the indebtedness of the garnishees, as to entitle them to a judgment. A majority of the Court is of opinion, that the plaintiffs in this action should have proved, that at the time the attachment was served on the garnishees, Hudson was the holder of the note. They not having done this, the Circuit Court, in the opinion of this Court, erred in rendering judgment against the garnishees. Its judgment is, therefore, reversed, and remanded for further proceedings in conformity with this opinion.

TOMPKINS, J., dissenting.

My opinion is, that the plaintiffs proved enough to entitle them to a judgment. The endorsee of Hudson might have come in and interpleaded, (see attachment law,) or in case he had no notice of the attachment, he might have had his action against the plaintiff for money had and received to his use. It seems to me to be but a reasonable construction of the statute, that the maker of a promissory note having paid the same under legal compulsion, should be discharged from any liabilities he might have incurred under the law merchant, to the last endorsee or holder by a voluntary payment to the maker or other person who might have had a prior interest in it.

(a.) See *Wolf v. Cozzens*, 4 Mo. R., p. 431; *Brotherton v. Anderson*, 6 Mo. R., p. 388.

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MENARD v. WILKINSON.

1. Where a petition set out an assignment in blank, it was held that a note assigned in blank, should have been received in evidence for as much as it was worth.
2. But when the blank was afterwards filled up, it was properly rejected in evidence, because the assignment then varied from that set out in the petition.
3. A blank endorsement is no assignment until the blank be filled up: it is only a power to the lawful holder to make an assignment to himself.
4. A petition setting out only a blank endorsement is insufficient; it must set out an assignment.

IN ERROR to St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

Menard brought an action by summons and petition against Wilkinson on a note. The petition alledges that the plaintiff holds a note on Wilkinson for a certain sum, setting the note out. Then the petition says, on which said note is the following assignment, to-wit: the words Edward Gant, whereby the plaintiff hath become the proprietor thereof, of which the defendant had due notice, yet the said debt remains unpaid, wherefor the plaintiff prays judgment. The defendant pleaded *nil debet*.

On the trial the plaintiff offered to read his note with the assignment in evidence, to which the defendant objected, on the ground that the endorsement being in blank, it did not appear to give any title to the plaintiff. The Court sustained the objection. The plaintiff then filled up the blank endorsement and again offered the note in evidence, to which the defendant again objected on the ground that the assignment on the note varied from that set out in the petition. The Court sustained the objection and gave judgment for the defendant.

It is assigned for error, that the Court rejected the note in evidence. On what legal ground the first objection was made and sustained we do not perceive. The petition and the assignment on the back of the note, did correspond. The only question that did arise at the moment the note was offered, was, did the proof support the allegation of assignment in the declaration? The proof should have been admitted for (93) as much as it was worth. The Court did not err in rejecting the note and assignment in full afterwards offered. The evidence did vary from the allegation. Yet this judgment cannot be reversed. The judgment is for the right party. The petition is defective, and if the evidence first offered had been admitted, yet the judgment would have been arrested. The petition does not show any assignment of the note to the plaintiff.

The petition says the plaintiff holds a note on the defendant, and then it says the note was endorsed in blank by the payee, whereby the plaintiff became the proprietor. The statute on this subject says the petition shall say the plaintiff holds a note on the defendant, and the note is to be set out in substance, and the petition shall set out the assignment. A blank endorsement is only a power to the lawful holder to

Menard *v.* Wilkinson.

make an assignment to himself, by filling up the blank. See 1 *Missouri Decisions* 478, Rector *v.* Wiggins and the authorities there cited. But until it is filled up, there is no assignment.

The judgment of the Circuit Court is affirmed with costs, &c.

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Decisions of the Supreme Court of Missouri,

FAYETTE DISTRICT, MARCH TERM, 1832.

HEDELSTON v. FIELD.

The husband and wife cannot convey an estate granted to the wife and her heirs during coverture. (See R. S. of 1825, p. 221.)

APPEAL from Boone Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of covenant brought by the appellee against the appellant in the Boone Circuit Court. The case was argued and submitted to the Court, without a jury. Verdict and judgment for the plaintiff, from which the defendant below appealed to this Court. The facts as preserved by the bill of exceptions, are, "that the land sold by the defendant Hedelston, to the plaintiff Field, as set forth in the said plaintiff's declaration, is the same land that was patented to Virginia Samuel, and her heirs and assigns forever, on the 10th of May, 1826. That the said Virginia Samuel at the time, and before the land was patented to her, was a *feme covert*, being lawfully married to Edgecomb S. S. Samuel; that Edgecomb S. S. Samuel, and Virginia his wife, on the 6th of April, 1831, sold and conveyed said land by deed in fee simple, with covenant of warranty, to the defendant Hedelston; that Hedelston, on the first of December, 1831, sold and conveyed the same by a deed in fee, with covenants of warranty and seizin, which said deed is the same upon which the present action is founded.

The sole question raised is, whether Samuel and wife by their deed to Hedelston, conveyed to him an indefeasible estate in fee simple, in and to the land, which had (95) been patented to the wife? In settling this question, we need only look to the provisions of the act regulating conveyances, *Revised Code*, p. 215, which after pre-

The State v. Reynolds et al.

scribing the manner in which the several deeds should be executed, proved and acknowledged, declaring their effect, &c., provides in the 12th section, p. 221, that "no covenant or warranty contained in any deed, (conveying the real estate of the wife,) shall in any manner bind or affect such married woman or her heirs, further than to convey from her and her heirs effectually, her right and interest, expressed to be granted or conveyed in such deed or conveyance: nor shall any thing therein contained be construed to authorize any husband and wife to convey any estate granted to the wife and her heirs during coverture." This is precisely such a case as the proviso describes, and on which the restraint of alienation is imposed. The conveyance from Samuel and wife to Hedelston, was inoperative to pass the title, and the Circuit Court adjudged correctly in so deciding. The judgment is therefore affirmed with costs.

THE STATE, TO THE USE OF SNELL, v. REYNOLDS, SHEPPERD AND SHEPPERD.

1. A security cannot maintain an action against a Constable on his official bond, for neglect in serving process against his principal, in consequence of which the principal becomes insolvent, and the security is compelled to pay the money. If the security has a remedy against the Constable, it is by action on the case.
2. But a security may protect himself by paying the debt and calling on his principal immediately to refund.
3. If a security notifies a creditor to sue, any indulgence thereafter to the principal, to the injury of the security, will discharge the security from liability.

ON ERROR from the Howard Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of debt, commenced in the Court below by Snell, against Reynolds and his securities, on an official bond given by Reynolds for the faithful discharge of his duties as Constable of Richmond township, in the county of Howard. There was demurrer and judgment for the defendants, to reverse which the plaintiff now prosecutes his writ of error in this Court. The declaration, after setting out the office bond, charges in substance "that on the 13th day of May, 1828, one George Craig and the said Snell (the plaintiff) became bound in a writing obligatory to one Samuel Davis, whereby the said Craig and Snell became bound to pay him on or before the 25th of December, 1828, the sum of sixty-six dollars," &c. The breach assigned is that Snell, for whose use this suit was brought, was the security of Craig in the writing obligatory executed to Davis; that on the 4th of April, 1829,

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Davis having sued Craig alone, recovered judgment against him; that Davis took out execution against Craig, and put the same into the hands of Reynolds, the Constable, on the 5th of December, 1829, to be returned within thirty days thereafter; that during the time the execution was in the hands of Reynolds, Craig owned property known to the Constable and subject to the execution, sufficient to satisfy the same; that the Constable refused or neglected to levy the execution, on either the property or body of Craig, and permitted him to go at large in the township during all the time the execution was in his hands, and made return thereon on the 4th of January, 1830, "nothing made on this execution, but the defendant has property now in my township, and I wish this execution renewed as I can go and levy on property;" that after the return of the execution aforesaid, Craig became insolvent, and has so continued ever since, by reason whereof Snell became liable, and was compelled to pay the debt to Davis, and has lost the means and opportunity of making the same out of Craig, &c. The condition of the bond is, "that the Constable shall execute all process to him directed and delivered," "pay the moneys received by him upon the same," and "in every respect to discharge the duties of Constable according to law." *Rev. Code*, p. 213; and the third section of the act to provide for the appointment (97) of Constables, authorizes suits to be brought upon the bond "at the instance of any person injured by the breach of such bond," &c.

The question for consideration is, whether Snell was injured by the neglect of Reynolds to execute the process against Craig, within the meaning of the act, so as to entitle him to sue on the office bond? The obligation given to Davis was joint and several.

Snell was as much bound in law to pay it as Craig. Davis might have sued Snell alone, and have compelled him to pay it without looking to Craig at all, or he might have sued them jointly, and after judgment have caused the property of Snell to be taken in execution, without touching that of Craig. Snell, as the security of Craig, might have protected himself by paying the debt and calling immediately on Craig to refund, or by notifying Davis to sue. Any indulgence thereafter to Craig, to the injury of Snell, would have discharged Snell from his liability. The conduct of the Constable, however illegal, imposed no new duty or obligation on Snell. He had no direct legal interest in the execution of the process, and cannot be considered a person injured by the Constable's neglect of duty, so as to entitle him to recover in this action. The object of the law in requiring bond and security of the Constable, is the protection of all those who are compelled or may by law choose to avail themselves of the Constable's services, and in regard to the rights or property of whom the Constable, while acting by virtue of process, is permitted or enabled to exercise a direct control to their prejudice. And in this case Davis might have put the bond in suit for the Constable's neglect of duty. When, by virtue of an execution against one man, the Constable takes the property or body of another, he must answer for it like every other trespasser, and his securities are not to be held responsible on their bond. The Constable like other men may be held to answer for injuries direct or consequential in an action of trespass or special action on the case. And in the case before the Court, if the plaintiff can recover at all, it must be in an action on the (98) case. The motion to dismiss was decided in favor of the plaintiff, and need not be now considered. The error, if any, was committed in his favor, and cannot now be urged by him.

The judgment of the Circuit Court is therefore affirmed with costs.

MYERS v. HAY.

An instrument warranting a Jack to be a sure foal getter, and a sound and healthy Jack, and promising to refund seventy-five dollars with interest, in case he proves otherwise, is a liquidated claim, and may be given in evidence before a Justice of the Peace without notice.

ON ERROR to the Howard Circuit Court.

WASH, J., delivered the opinion of the Court.

Hay sued Myers before a Justice of the Peace in an action of debt. Myers pleaded a set-off and got judgment. Hay appealed to the Circuit Court, where on a trial *de novo* Hay had judgment, to reverse which Myers has brought his writ of error to this Court. On the trial before the Justice, Myers pleaded a set-off of the following instrument: "Know all men by these presents, that I, Jones Hay, have this day sold unto John W. Myers a Jack, which I warrant to be a sure foal getter, and a sound healthy Jack, and if the said Jack does not prove to be a sound Jack, then the said Jones Hay is bound to pay back unto John W. Myers seventy-five dollars with interest, this the 23d day of November, 1830," and got judgment. On the trial in the Circuit Court, Myers offered to read in evidence the same instrument, which was objected to by Hay, and rejected by the Court, as inadmissible under a plea of set-off. Two questions are presented.

First. Whether this is a case of liquidated damages; and

Second. Whether it could be given in evidence without notice. We think the law is with the appellant on both questions. It is clearly a case of liquidated damages, and we incline to construe the statutes so as to admit the parties to the same rights in pursuing their claims, and making their defences in the Circuit Court, and the same course of proceeding that is allowed before the Justice.

The judgment of the Circuit Court is therefore reversed, and the cause remanded.

SELICK AND GREGORY v. THE INHABITANTS OF THE TOWN OF FAYETTE.

1. A petition to change the charter of an incorporated town, signed by two-thirds of the inhabitants of the corporation, and a second order of incorporation by the County Court in pursuance of the petition, together with a subsequent election of town officers under the charter as changed by the County Court, is evidence to be left to the jury, from which they may presume a surrender of the first, and an acceptance of the second charter.
2. A fine imposed on an individual by a corporation, for exhibiting a caravan of animals within the limits of the corporation, before any ordinance existed on that subject, is in its nature a judicial sentence, and is illegal.

APPEAL from Howard Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

The inhabitants of the town of Fayette sued the defendants before a Justice of the Peace and had judgment. An appeal was taken to the Circuit Court, where judgment was again rendered against them, and they appealed from that Court to this. On the part of the plaintiffs below, appellees here, it was proved that on the 26th day of November, 1826, the town of Fayette was incorporated by order of the County Court; and that on the 24th May, 1831, an order was made that the defendants, Sellick and Gregory, appellants here, pay the sum of ten dollars for leave to exhibit their caravan of animals, consisting of elephants, &c., within the town of Fayette, two days, say the 24th and 25th days of May, 1831. The plaintiffs further proved, that the defendants knew the ordinance was passed, and that they exhibited, on (100) the days mentioned, a caravan of animals in the town. The defendants then proved that since the above order of incorporation, the corporators within the limits thereof, petitioned the County Court to do away with and destroy the said act of incorporation, and it was admitted that the Court made an order on that head, which was lost. It was admitted by the appellees that two-thirds of the corporators subsequently petitioned the County Court to contract the limits of the corporation, and to grant a new order of incorporation. The appellants offered in evidence a writing purporting to be an order of incorporation made in pursuance of the last mentioned petition, which, on motion of the appellees, was excluded. It was admitted by the appellees that the place where the caravan of animals was shown, was without the limits of the corporation, as designated by the last supposed order of incorporation. The appellants then offered parol evidence to prove that the corporation, as established by the first order of incorporation, extended beyond the town lots and bounds of Fayette, which was excluded. It was also proved that the town officers last elected, were elected under the order of incorporation, the evidence of which had been excluded by the Court. The Court then, on motion of the appellees, instructed the jury:

First. That the order of incorporation made by the County Court, on the 26th November, 1826, was legal.

Second. That the other order offered in evidence and excluded by the Court, was null and void.

Sellick and Gregory v. Inhabitants of Fayette.

Third. That the bye-law offered in evidence, and by which the fine or tax was imposed on the appellants, was legal.

Fourth. That if they believed the defendants exhibited their animals on the days named, knowing the ordinance, and that they exhibited them within the limits fixed by the first order of incorporation, then they ought to find for the plaintiffs, appellees. These instructions are resisted and assigned for error. The points that arise from these instructions, are:

First. Whether the evidence offered to prove that the limits of the corporation established by the first order of incorporation, extended beyond the town lots and the bounds of Fayette, was properly excluded by the Circuit Court.

(101) Second. Whether the order of Court purporting to be a second order of incorporation was properly excluded.

Third. Whether the bye-law given in evidence, and by which a fine was imposed on the appellants, was legal.

First. We do not think it material to inquire here whether the first point ought to be decided for the appellants or appellees, that is to say, whether the first act of incorporation was legal, or whether its legality could be inquired into in this action. It is sufficient to say that we think the Circuit Court ought to have permitted the second order of incorporation to be given in evidence. For the petition of the corporators to the County Court, and the action of the County Court on that petition, together with the subsequent election of town officers under that order, were certainly evidence to be left to the jury from which they might presume a surrender of the first charter and an acceptance of the second.

Third point. The bye-law, so called, and which appears to us to be nothing but a judicial sentence, is in our opinion illegal. Previous to that time no ordinance was made to prevent or restrain such exhibitions, and the Legislature of the corporation passes a sentence, which the Court of the corporation might lawfully have done, had there been a law to authorize the act. The act to provide for the incorporation of towns, (see *Rev. Code*, sec. 7, p. 766,) provides that the Board of Trustees shall have power to pass bye-laws and ordinances, &c., to impose fines, &c., for breaches of these ordinances. The fine in this case is imposed before any ordinance existed. The second and third instructions were in our opinion improperly given. Of the first and fourth we do not think it necessary to say anything more.

The judgment of the Circuit Court is therefore reversed, and appellants are allowed their costs, both in this Court and in the Circuit Court.

Decisions of the Supreme Court of Missouri,

BOWLING GREEN DISTRICT, APRIL TERM, 1832.

THE STATE *v.* LEDFORD.

The act of 1831, declaring assaults, batteries, affrays, riots, routs and unlawful assemblies, offences not indictable, but punishable before Justices of the Peace in a summary way, held constitutional.

ERROR to the Circuit Court of Ralls county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an indictment for assault and battery against Ledford. The defendant moved to quash the indictment, and the motion was sustained. The case is brought to this Court by a writ of error. On the 19th February, 1825, the General Assembly of the State passed an act to allow Justices of the Peace jurisdiction in cases of breach of the peace upon certain conditions: by which act it is provided, that when complaint is made on oath by any person, to a Justice of the Peace, of an assault and battery, the Justice shall issue his warrant against the offender, shall proceed to a trial of the offence, and if the defendant is found guilty, shall impose a fine to the use of the county of not less than \$5. The third section provides for a jury of twelve men to try the offence, and authorizes them to assess the fine so as not to exceed \$80. The act then provides for collecting the fine, and says the defendant shall be imprisoned till the fine and costs are paid. The sixth section provides for an appeal to the Circuit Court. The act also provides that the defendant may have his election to be tried before the Justice or before the Circuit Court. The tenth section of the act provides, that nothing contained in the act, shall prevent the grand (103) juries from presenting any person guilty of any offence against the public peace unless such person may have been punished therefor, under the provisions of this act, in such manner as may be a bar to further proceedings for the offence. At

The State v. Ledford.

the time this act took effect, the offences of assaults and batteries were by law indictable in the Circuit Court by the finding of a grand jury. This Court in the case of *Stein v. The State*, declared this act to be unconstitutional and void. See 2 Mo. R., 67.

By an act passed 18th January, 1831, it is declared, "that hereafter no assault, battery, affray, riot, rout, or unlawful assembly, shall be held or considered an indictable offence, but the same shall be prosecuted and punished in a summary mode before a Justice of the Peace." Then some cases of an aggravated nature are saved out of the act. By the second section, the act of 1825 is revived, and the jury may assess the fine, &c.

It is assigned for error on the part of the State, that this last act and that of 1825, are both repugnant to the Constitution of the State, and are therefore void.

That part of the Constitution of the State to which these acts are said to be repugnant by the Circuit Attorney, is found in the 9th section of the 13th article of the Constitution, which says that in all criminal prosecutions, "the accused has the right to be heard by himself or his counsel, to demand the nature and cause of accusation, to have compulsory process for witnesses in his favor, to meet the witnesses face to face, and in prosecutions on presentment or indictment to a speedy trial by an impartial jury of the vicinage. That the accused cannot be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by the judgment of his Peers or the law of the land;" and also the 14th section of the same article, which says "that no person can for an indictable offence be proceeded against criminally, by information, except in cases arising in the land or naval forces," &c.

It is argued by Mr. Hunt, Circuit Attorney for the State,

First. That an assault and battery is a criminal case or offence, and must be proceeded against by indictment alone. That the words, by the law of the land, means due process of law, which is by indictment or presentment of a grand jury, and to prove this he cites 4 Coke's *Institutes*, p. 50, where it is said that in the great charter of English liberty of Hen. III, "the words, by the law of the land, are interpreted to mean due process of law, and that is also interpreted to mean by indictment or presentment of a grand jury."

The Circuit Attorney also insists that this summary mode of proceeding is a proceeding by information, which is contrary to the Constitution of the State as above cited; and that the late statute is in no wise better than the act of 1825, which this Court has declared to be unconstitutional.

The argument on the side of Ledford principally rests on the ground, that the Legislature have the right to define how offences shall be punished and what shall constitute an offence, and that this offence not being now indictable, the Legislature may prescribe any other mode of proceeding against the offender, than by indictment.

In the case of *Stein v. The State*, I did not deliver the opinion of the Court, but I did concur in the result of that opinion, but for reasons not expressed in the opinion. My view of that question is, that inasmuch as the offence of assaults and batteries were then indictable, and not made otherwise by the act of 1825, the proceeding before a Justice of the Peace in a summary way, was clearly a proceeding by way of information, or by a process in the nature of an information, while the offence still retained the character of an indictable offence; an information is defined to be a

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declaration or statement without being made on the oath of the grand jury, whereby a person is charged with the breach of some public law or penal statute.

It was a mere suggestion on the record, that an offence had been committed, and was in the nature of a declaration as to the particulars of the offence. See *Jacobs' law dictionary*, title information, and 4 *Blackstone's Com.* 308-9-10. In page 309 *Blackstone* says, it *lay* for riots, batteries, libels, and *Jacobs* under the title above (105) cited, says the same. An information then, as understood by the makers of our constitution, is a proceeding by way of complaint, without the intervention of a grand jury to punish a person for some violation of public law, such as breaches of the peace, riots, &c., or for felonies, no matter how disgraceful the offence may be.

By the English law, the offender had a right to a trial by a petit jury. Our statutes allow the same privilege. The 14th section of our bill of rights says, "no person can for an indictable offence, be proceeded against criminally by information, except, &c." What does the constitution mean by the use of this prohibition? The convention surely intended to secure some right to the citizen, which otherwise might have been withheld from him.

By the common law, a person for many offences might have been proceeded against either by an information or by an indictment, 4 *Bl. Com.* 310. I understand the constitution to say this, and no more, that as long as the Legislature choose to say any offence is of sufficient magnitude to require the intervention of a grand jury to accuse the offender, or to secure him from unfounded prosecution for the offence, just that long shall such person be secured against all prosecutions by information for a like offence against public law.

In 1825, assaults and batteries were indictable, and while indictable, they could not be proceeded against by the summary mode authorized by the act of 1825.

The counsel for the State says, by way of argument, if the Legislature can make assaults, &c., not indictable, they can also declare that larceny, murder, and every other crime, shall no longer be indictable, whereby they may entirely dispense with a grand jury, and punish all offences by information, whereby the security of life, liberty, and property would be greatly endangered.

My first answer to this inquiry is, that by the 5th article of the amended constitution of the U. S., it is declared that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in certain cases therein mentioned. This declaration of the constitution of (106) the U. S., I understand to be the supreme law of the land. It therefore follows, that whenever the offence is made capital by law, and where the crime is infamous, the Legislature cannot authorize any other mode of proceeding, than by indictment or presentment. This throws a shield around the citizen to a great extent. What would be the true meaning of the words, infamous crimes, I will not now enquire, because I conceive breaches of the peace are not of that character. I will, however, name one authority on this point. (*Jacobs' law dic.*, title infamy, where it is said infamy extends to forgery, perjury, gross cheats, &c., disables a man to be a witness or a juror, and judgment of the pillory makes infamy.) I will now examine the case as now presented: breaches of the peace are no longer indictable.

The constitution says, that in criminal prosecutions the accused cannot be deprived of life, liberty, or property, but by the law of the land; and to ascertain what these expressions comprehend, we are referred to *Coke's institutes* as above cited; by *Coke* it appears that the same words that are used in our constitution, were used in the

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great charter of English liberty, granted first by King John, and again and more fully granted by his son King Henry III, to the English people. The words of the charter on this point are, that "no man can be deprived of life, liberty or property, but by the judgment of his peers or the law of the land." Lord Coke commenting on this charter, in a great many particulars, comes to the words above referred to, and says, *nisi per legem terrae* but by the law of the land; he then says, "for the true sense and exposition of these words, see the statute of 37, Edward III, cap. 8, where the words by the law of the land, are rendered without due process of law, for there it is said, though it be contained in the great charter, that no man be taken, imprisoned, or put out of his freehold without process of law, that is by indictment or presentment of good and lawful men, where such deeds be done, in due manner or by writ original of the common law, without being brought in to answer but by due process (197) of the common law;" hence it is contended that by the words, "by the law of the land," we are to understand due process of law: and that these last words being farther interpreted, mean, by presentment or indictment of a grand jury. I do not agree to this interpretation of the words used in the charter of Henry III, nor do I understand that Coke gives the words, *nisi per legem terrae*, this meaning. It is only by subsequent enactments of the British parliament, that these words are made to be so comprehensive that due process of law, and the law of the land, mean an indictment or presentment by a grand jury. Let us examine Lord Coke's own exposition of the words, "but by the law of the land," in page 45 of 4th int. he says "that no man be taken or imprisoned, but *per legem terrae*, that is by the common law, statute law, or custom of England, for these words, *per legem terrae*, being toward the end of the chapter, do refer to all precedent matters in the chapter, and hath the first place, because the liberty of a man's person is more precious to him than all the rest that follow; therefore it is great reason he should be relieved by law if he be wronged therein as hereafter shall be shown. In this the words, by the law of the land, are expressly understood by Coke to mean the common law, and statute law of England.

The author of the institutes divides the 29th chapter of the charter into nine several heads, and comments on each head; in beginning his comment he says, "the genuine sense hereof being distinctly understood, we shall proceed in order to unfold how the same have been declared and interpreted. First. By authority of parliament. Second. By our books. Third. By precedent.

First. No man shall be taken, (that is,) restrained of his liberty by petition or suggestion to the King or his counsel, unless it be by indictment or presentment of good and lawful men; this branch and divers other parts of this act have been notably explained by divers acts of parliament quoted in the margin.

The author then refers to seven acts of parliament made in the reign of different Kings, to show how much the original meaning of the words were enlarged, so as at last to be made to mean, that no man should be taken or imprisoned without indictment or presentment, in contradistinction of this thing being done by petition or suggestion to the King. See page 46, *ibid.*

When the author comes to the 8th branch of his division, he takes up the words, (no man shall be deprived of life, liberty, or property, but by the law of the land); he then shows how these words were enlarged, by the statute of 37, E. III; which will attend to more particularly hereafter. In page 51, the identical words, *per legem terrae*, are treated of, and he says, (hereupon all commissions are grounded, wherein

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it is said, that justice be done according to the laws and customs of England, and it is not said in the commissions, that justice be done according to the laws and customs of the King of England, lest it might be thought to bind the King only, nor is it said according to the laws of the people of England, lest it might be thought to bind them only; but that the law might extend to all, it is said by the law of the land, that is England). The author then says, "and aptly it is said in the charter, by the law of the land, that is, by the law of England; for in those places where the law of England runneth not, other laws are allowed. For example, if a robbery be committed on the high seas, the law of England extendeth not, but the admiralty law will extend." Many other examples are given, where the common law and statute law of England will not extend.

This will suffice to show what is to be understood by the words, law of the land. In Missouri I understand the law of the land to be,

First. The constitution of the U. S., the acts of Congress, and treaties made in pursuance thereof, to be the supreme law of the land; every other law must yield to them.

Second. The constitution of the State.

Third. The acts or statutes of the General Assembly, not inconsistent with the foregoing.

Fourth. The common law of England as adopted by the act of the General Assembly of 1816.

I think I have shown that the words, *nisi per legem terrae*, used in the *magna charta* of H. III, meant nothing more than the statute law, and common law of England.

(109) I will now proceed to show how it happened that the people and parliament of England found it necessary to secure themselves more effectually by legislative enactments. In the first year of the reign of Henry III, this charter was granted by the Earl of Pembroke regent of England, and during the minority of the King to reconcile the people to the government of the young Prince. See 1 vol. Hume's hist. Eng. 390. This King, whose reign was a long one, violated this charter repeatedly; *ibid.* 401, 402, and throughout his whole history we see repeated instances of the violation of the charter, and he said why should I observe the charter, which is neglected by my grandees and nobility. *Ibid.* 401. The King was partial to foreigners, they filled all the great offices of the State, *ibid.*, and that when the practices of these strangers were complained of, and the charter objected to them, they scrupled not to reply, what did the English laws signify to them; they minded them not. In this same reign matters of right and property, were by the King's servants and officers, at least some of them decided by foreign law, *ibid.* 489, and the whole reign was exceedingly arbitrary and oppressive. During the subsequent reigns the great charter in many particulars, was often by the King violated, and often renewed; and in the reign of Edward III, the great charter received above twenty confirmations by the King. *Ibid.* 607. The historian is of opinion that the reasons for the confirmations must have been, because the charter had been violated. Thus we see a constant struggle between the people and the crown for a long period of time, for liberty on the one hand, and power and prerogative on the other. From the time of William the conqueror in the year 1066, till the end of the reign of E. III, in 1377, a period of almost 300 years, this struggle was continued, when at last, in the reign of this last Prince, English law and government became better understood and more settled, than in any former age. *Lord Coke* in page 50, 4th Inst. says the words, by the law

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of the land, are rendered by the statute 37th, E. III, to mean that no man be taken or imprisoned, or put out of his freehold, without due process of law, that is, by indictment or presentment of a grand jury. I understand the author to mean that that statute declares that such shall be the future meaning of the words, (law of the land). Our constitution does not declare what shall be the meaning of the words, the law of the land. I feel bound to understand the words according to the common import thereof. It is true that the law of Missouri requires all judicial process to be in due form. Due process means legal process, process warranted and provided for by law; but that due process of law includes a proceeding by an indictment or presentment, and excludes every other mode of proceeding, I am constrained to deny. I cannot find any note of the statute of 37th Edward III, in any history. All I can know about it is what Coke says about it in the page last cited. I find in Hume's hist. of Eng. 607, the following mention made of a statute passed in that reign, to-wit: it is declared in one of Edward's statutes, that no man of what state or condition soever, shall be put out of land or tenement, nor be taken, nor imprisoned, nor be disinherited, nor be put to death, without being brought in to answer by due process of the law. In what year of the reign this statute was made it does not appear; this may be the statute to which Lord Coke refers, but I think it is not.

I am aware that in the 5th article of the amendment to the constitution of the U. S., this language is used, (to-wit:) that no person shall be deprived of life, liberty, or property, without due process of law. This due process of law I understand is to be such as the law may have provided. It surely cannot mean in this instance an indictment or presentment, because the same article, in the first point thereof, points out the cases in which an indictment or presentment must be used, which cases are where the crime is capital or otherwise infamous. I understand that in this case and in all others, except those excepted therein, where the judgment would be against life, liberty, or property, the process must in all respects be legal process, such as is provided for by the law. It shall not be the command of the General Assembly by warrant of execution, nor the mandate of the executive, nor of any other person than (111) those appointed by the law and the constitution, to adjudicate in such cases. If a warrant of death did not set out the offence for which the offender was condemned, I apprehend his execution would be unconstitutional, because the law requires that the offence should be set out, and without it the warrant would not be due process of law.

I cannot suppose that any man who ever spoke the English language, and who only understood the force of words moderately well, and who had ideas moderately clear, would when he intended to say or write that no man should be deprived of life, liberty, or property, unless on a presentment or indictment of a grand jury, would say in lieu thereof, but by the law of the land, or by due process of law. An indictment or presentment may or may not be due process of law, as the law happens to be at the time. The Legislature have imposed fines on persons for retailing liquor without license; now the consequence of a conviction in this case would be to deprive the man of property, at least so much as would pay the fine and costs, and a further consequence might be to imprison him for want of payment. Must there be to satisfy the constitution an indictment or presentment before the offender can be made to answer? The practice of all the N. American States is to the contrary of this. If the fundamental laws of the land require that no man in particular cases, shall lose his life, or liberty, without an indictment of a grand jury, be it so, and if

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they forbid, that any man shall in any case lose life, liberty, or property, without the proceedings against him are all according to law, this is wise also, and ought to be the rule in every country. The counsel have referred us to a case in 4 *Coke's Inst.*, p. 50, which he alleges is just like the present case, wherein *Coke* declares that the government of England violated the charter. *Coke* says, "against this ancient and fundamental law, and in the face thereof, I find an act of Parliament made 11th Hen. VII, by which as well Justices of Assise, as Justices of the Peace, without any finding or presentment by verdict of twelve men, upon a bare information for the King before them made, should have full power and authority by their (112) discretions to hear and determine all offences and contempts committed or done by any person or persons against the form and effect of any statute made and not repealed; by color of which act, shaking the fundamental law. It is not credible what horrible oppressions and exactions, to the undoing of infinite numbers of people, were committed by Empson and Dudley, being Justices of the Peace throughout England, and upon this unjust act (as commonly falleth out in like cases) a new office was erected, and they made masters of the King's forfeitures. Huine says, in his second volume of the History of England, p. 245-6, that after Henry VII had ended his wars, he gave full scope to his natural propensity and avarice, which had ever been his ruling passion, being increased by age and encouraged by absolute authority, broke all restraints of shame or justice, he had found two ministers, Empson and Dudley, perfectly qualified to second his rapacious and tyranical inclinations, and to prey upon his defenceless people. These instruments of oppression were both lawyers, the first of mean birth, of brutal manners, of an unrelenting temper. The second better born, better educated, and better bred; but equally unjust, severe and inflexible. By their knowledge in the law, these men were qualified to pervert the forms of justice, to the oppression of the innocent; and the formidable authority of the King supported them in all their iniquities. It was their usual practice at first to observe so far the appearance of law as to give indictments to those whom they intended to oppress, upon which the persons were committed to prison, but never brought to trial, and were at length obliged, in order to recover their liberty, to pay heavy fines and ransoms, which were called mitigations and compositions. By degrees the very appearance of law was neglected; the two ministers sent forth their precepts to attach men, and summoned them before themselves and some others at their private houses in a Court of Commission, where in a summary manner, without trial or jury, arbitrary decrees were issued both in pleas of the Crown and controversies between private parties. Juries themselves when summoned, proved but small security, being browbeaten by these oppressors, nay fined, imprisoned and punished (113) if they gave sentence contrary to the inclination of the ministers. "Old penal statutes, supposed to be obsolete, were revived against all men, spies were employed by them, encouraged and rewarded throughout the kingdom, whereby the King's treasury became very rich." These were some of the consequences which grew out of the act H. VII. By the foregoing history of the statute of 11 H. VII, and the oppressions under it, it is quite clear that *magna charta* was greatly infringed; the Justices had discretionary power of themselves, without a petit or grand jury to give what judgments they pleased, might fine to any amount and imprison to any extent. By our statute the Justice has no discretion, he must follow the law as far as he is concerned, and the party may have a jury of twelve men to try his case, before the Justice can give a sentence at all. I therefore conclude that the statute of H. VII

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was contrary to *magna charta*, more on account of the authority given thereby to act arbitrarily and at discretion, than on account of an indictment or presentment being dispensed with, in cases of mere misdemeanor. I hence conclude that our statute is materially different from that of 11 H. VII.

The judgment of the Circuit Court is affirmed with costs.

WASH, J.

I concur in the foregoing opinion.

TOMPKINS, J.

The Presiding Judge having made a statement of this case, it is unnecessary that I should make one. The cause was argued at the April term of this Court for the last year, and was continued under advisement in order that if a similar case should be brought up in any other of the districts, this Court might have the advantage of additional argument. No other case of the kind has been brought before the Court, although by the failure to hold a Court here in December last, this cause has stood over till the present term; this is the more to be regretted as the counsel who argued the cause had but a short time to prepare, and but few authorities to consult; little more then can be expected in this opinion than the conclusions which under such (114) circumstances I have drawn. Since the decision of the case of the State *v.* Stein, my confidence in the correctness of the opinion then delivered, has been much impaired; and the act of Assembly, passed since that time, declaring that no assault and battery shall be held and considered an indictable offence, and that the same shall be tried in a summary mode, before a Justice of the Peace, removes still more of the doubt which I entertained of the constitutionality of the act under which Stein was indicted. In all cases where it does not plainly appear that an act of Assembly is unconstitutional, I deem it the duty of a Court to decide that it is constitutional, and to carry it into effect. Under such impressions I am of opinion that the judgment of the Circuit Court ought to be affirmed.

THE STATE v. PURDOM.

3	114
98	212

Permitting a pack of cards to be used, with which money is won and lost, is an offence punishable under the statute against gambling. (Note a.)

ERROR from Ralls Circuit Court.

WASH, J., delivered the opinion of the Court.

Purdom was indicted under the 89th section of the act concerning crimes and punishments. The indictment charges that he "suffered a certain gambling device, to wit: a pack of cards, at which said gambling device money was then and there won and lost, to be then and there used in the grocery of said Thomas A. Purdom, and that said grocery was then and there in the possession of and use of said Thomas," &c. The defendant demurred and had judgment, to reverse which the plaintiff has come with her writ of error into this Court.

The 87th section of the act above referred to, provides a punishment for the *keepers* of certain gambling tables "commonly called A. B. C., Faro Bank, E. O., Roulette, Equality, or any other kind of gaming table or tables," &c.

(115) The 88th section of the same act provides a punishment for *persons* "who shall at any time *win*, or *lose*, or *bet*, in money, goods or chattels, on any of the games played at the tables aforesaid, or at any other gaming table, or any game of cards, or at any other gambling device whatever," &c.

And the 89th section provides "that if any person or persons shall suffer any of the gaming tables above enumerated, or other gaming table or gambling device, at which any game of chance is played, or money or property won or lost, to be *set up* or *used* in his or her house, &c., he shall forfeit," &c.

The only question submitted for the consideration of this Court is, whether the offence charged is provided for in the 89th section above referred to. That cards are a gambling device, and are to be so considered, seems very clear from the provisions of the 88th section. The object of the 89th section was to prevent the winning or losing of money or property; whether at games of chance on the tables enumerated and described, or at games of skill, or partly of chance and partly of skill, played by or upon any other gambling device, is no way material. The indictment charges that the defendant permitted a pack of cards to be used, and that money was won and lost, &c. We think it clear that the statute intended to punish such offences.

The judgment of the Circuit Court, sustaining the defendant's demurrer to the indictment, is therefore erroneous and must be reversed with costs, and the cause is remanded for further proceeding.

M'GIRK, C. J.,

My opinion is, that the indictment should show that some game of chance was played, and that by that, money or property was won or lost.

(a.) See Eubanks v. The State, 5 Mo. R., 450.

(116)

SALLEE v. HAYS ET AL.

3	116
162	556

An authenticated record of a judgment or decree, rendered in a sister State without actual notice to the defendant, is not entitled to full faith, credit and effect in this State. (Note a.)

ERROR from the Callaway Circuit Court.

WASH, J., delivered the opinion of the Court.

Sallee brought an action of debt against the defendants on a decree in Chancery, rendered against them in the State of Kentucky. The declaration contains four counts.

The first count set out that the decree was made in the Circuit Court for Montgomery county, in the State of Kentucky, against the defendants, as heirs of one William Hays, deceased, for the non-performance of covenants entered into by their said ancestor, &c. That the same was directed to be levied of the assets real, which had descended to them from their said ancestor, averring that according to the laws of Kentucky, the decree bore interest, &c.; and that assets real, more than sufficient to pay and satisfy the decree, had come by descent to the hands of the defendants.

The second count contains the same averments, with an additional one, that by the laws of Kentucky, in force at the time the decree was rendered and ever since, the same was conclusive upon the defendants, &c.

The third count is precisely like the second, except in averring that by the laws of Kentucky, the decree was *prima facie* evidence of debt against the defendants.

The fourth count contains the further averments that the suit was commenced in the Montgomery Circuit Court against the defendants, who were then non-residents of the State of Kentucky, together with other defendants who were residents of the county, upon a covenant of the defendant's ancestor, touching the title to a tract of land which was lying in said county, and within the jurisdiction of the Montgomery Circuit Court; that orders of publication were duly made and proved against said defendants according to the laws of Kentucky; that according to those laws the (117) decree thus made and obtained, was *prima facie* evidence of debt due from the defendants to the plaintiff; and that said defendants had no assets real by descent in Kentucky, but had in the State of Missouri, more than sufficient to pay and satisfy the decree, &c.

The defendants pleaded,

First. *Nul tiel* record.

Second. *Nil debet*.

Third. That they were not residents of the State of Kentucky at the commencement or any time during the pendency of the suit in Chancery; that they had no legal notice served on or given to them to appear and defend said suit; that they never waived notice or submitted themselves to the jurisdiction of said Montgomery Circuit Court, &c.

The fourth plea averred that the said Chancery Court in Kentucky, had no power or jurisdiction to bind them by their judgment and decree declared on, &c. Issue

Sallee v. Hays et al.

was joined on the first, second and fourth pleas, and the Court sitting as a jury, found for the plaintiff on the first and fourth; and for the defendants on the second. To the third plea, the plaintiff filed a replication, stating that by the laws of Kentucky, the said Montgomery Circuit Court had power to enter decrees against absent defendants, after publication duly made, and averring that due publication had been made according to said laws, by virtue of which the decree was legally and properly given, and was obligatory and conclusive upon said defendants, that they had received notice, &c., to which replication the defendants demurred, and had judgment, and the question now submitted to the consideration of this Court, grows out of the demurrer to this replication to the *third* plea. Various errors have been assigned.—The first, and the only one that need be now disposed of, is, that the Court erred in sustaining the defendants' demurrer to the plaintiff's replication to the defendants' third plea.

It has been strongly urged that by the 1st sec. of the 4th art. of the Constitution of the United States, and the act of Congress passed May the 26th, 1790, providing (118) for the authentication of records and judicial proceedings, "as they have been construed by the Supreme Court in the case of Mills and Duryee, 7 *Cranch*, 481, and the case of Hampton and McConnel, 3 *Wheat.* 234, full faith, credit and effect, should be given to the decree set out in the plaintiff's declaration; that since it has been admitted by the demurser, that the same would be conclusive, or at least *prima facie* evidence of debt against the defendants in the Courts of Kentucky, it should be so taken and held in the Courts of Missouri. The language of the Court in the cases cited, is certainly very strong, and seems to push the law beyond the occasion. Those judgments were obtained upon actual personal notice: and in Mills and Duryee, Mr. Justice Story, in delivering the opinion of the Court, lays much stress upon that fact. We should submit with deference to the decision of the Supreme Court upon a case in point, but until the case does occur, and the decision is made, we shall indulge the hope that the doctrine will never be pushed farther than it has been in the cases above referred to. The references which have been made to the decisions in Pennsylvania, Connecticut and Vermont, seem to give to judgments founded on attachments, the weight of *prima facie* evidence. This is farther than we wish to go. The case of Patrick and Hutcheson, decided by this Court, does not touch the question now under consideration. Upon the whole, therefore, without attempting to discuss the minor points that have been raised in the pleadings, the judgment of the Circuit Court being for the right party on the merits, it is affirmed with costs, and this cause is remanded to the Circuit Court, with directions to set aside the finding of the jury on first and fourth issues.

(a.) See Webb v. Garner & Trigg, 4 Mo. R., p. 12.

(119)

PINKSTON v. STONE.

1. Where the defendant asked leave to file the plea of *nil debet* on the day of trial, doing which would have operated as a surprise to the plaintiff, the Court exercised its discretion soundly in refusing leave.
2. Where the plaintiff stated, in the *queritur* of both counts of his declaration, his demand to be one thousand dollars, and in the statement of his cause of action showed a judgment for \$762 20, and assigned for breach that the defendant had not paid the one thousand dollars demanded as in the *queritur*, the breach, whether it would have been held on demurrer, well assigned or not, was held to be good after verdict.
3. The declaration contains two counts. The damages found exceeded those laid in either count separately, but were less than the damages laid in the two added together. Neither the bill of exceptions nor the pleadings showed but what more than one record was given in evidence. Held that there was no error in the finding.

ERROR to Callaway Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Stone, in the year 1828, brought his action against Pinkston, on a judgment rendered against Pinkston, in Kentucky. At a subsequent term, the plaintiff, by leave, amended his declaration by filing two new counts, of which alone it is necessary to take notice.

To the amended declaration, the defendant by leave pleaded in vacation, *nul tie record*, and the cause was continued till the next term, when the defendant moved the Court for leave to file the plea of *nil debet*. The Court refused leave. The defendant then moved the Court to strike out both the counts of the amended declaration, which the Court refused to do; and among other things it is assigned for error, that the Court refused to allow the plea of *nil debet* to be filed, and strike out the two counts of the amended declaration.

First. Our statute, p. 624 of the *Digest*, sec. 19, of the act to regulate proceedings at law, provides that all pleadings may be amended at any time before a jury is sworn, upon such terms as the Circuit Courts may respectively prescribe. Here the plaintiff came to establish his demand by proving there was such a record as declared on; and at the day of trial the defendant comes with a plea of *nil debet*, which, if (120) good in Kentucky is good here, and operates as a surprise to the plaintiff. The Circuit Court, we think, exercised its discretion soundly, in refusing leave to file this plea.

Second. In the *queritur* of both counts of the amended declaration, the plaintiff states his demand to be one thousand dollars, and in the statement of his cause of action he shows a judgment in Kentucky for \$762 20, and it is assigned for breach that the defendant had not paid the sum of \$1000 above demanded as in the *queritur*. This breach, (whether it would be held on demurrer to be well assigned or not,) we are disposed to say ought to be held good after verdict. The defendant will not

Pinkston v. Stone.

demur, but waits till the last moment, when the plaintiff is ready for trial, to ask the Court to strike out all the plaintiff's declaration. The Court ought not to comply with such a request, unless the declaration were most glaringly defective, and the plaintiff is entitled to all the indulgence he would have after verdict.

It was further assigned for error, that the damages found by the Circuit Court, \$236, exceed the damages laid in the declaration. In each count of the amended declaration, the plaintiff has alledged his damages to amount to \$200. It not appearing either from the bill of exceptions or from the pleading, that only one record was given in evidence, we are inclined to favor the plaintiff by allowing him to avail himself of the amount of damages laid in the two counts. It is a hard case. The damages, as laid in each count of the declaration were great enough, if the cause had been tried in a reasonable time; but in two or three years after the commencement of the action, the interest on the demand exceeded the damages laid in one count of the declaration by a small sum. This delay was produced by the defendant. The finding being on the amended declaration, which contains two counts, we think there is no error in this. The judgment of the Circuit Court is therefore affirmed.

Decisions of the Supreme Court of Missouri,

FAYETTE DISTRICT, DECEMBER TERM, 1832.

NEWBERRY v. MELTON.

1. Reading the notice of an appeal in the presence of the appellee, is not a sufficient service; it must be given in writing.
2. The notice of an appeal from a Justice of the Peace, served after the lapse of a term of the Circuit Court at which the cause might have been tried, but ten days before the term at which the cause was actually tried, is insufficient.

ERROR from the Crawford Circuit Court.

WASH, J., delivered the opinion of the Court.

This was originally an action commenced before a Justice of the Peace, by Melton *v.* Newberry, in which there was a trial, verdict and judgment for Melton on the 10th of July, 1830. On the 13th of the same month, the plaintiff in error, who was defendant before the Justice, took an appeal to the Circuit Court. On the 23d of September, 1830, the transcript was filed in the Clerk's office by the Justice who tried the cause. On the 28th of February, 1831, the appellant put into the Sheriff's hands a notice of appeal to be served on the appellee, Melton, the defendant in error, which was served by the Sheriff on the 12th of March, 1831, "by reading the same in the hearing of Melton." At the May term of the Circuit Court the appellee moved to dismiss the appeal for want of notice, which was done accordingly: to which opinion of the Circuit Court, dismissing the appeal, Newberry excepted, and now comes with his writ of error into this Court. It appears by the bill of exceptions in addition to the facts above stated, that a subpoena had been served on witnesses to appear on behalf of Melton; but whether it was taken out or ordered by Melton, does not appear.

Newberry v. Melton.

(122) The counsel for the plaintiff in error has presented two points on which he claims reversal:

First. That the notice was sufficient and was properly served; and

Second. That Melton by his preparation for the trial in taking out the subpoena had waived all objection on that score.

The 23d section of the act establishing Justices' Courts, &c., *Rev. Code*, p. 481, provides "that in all cases of appeals not prayed for on the day the trial is had, the party appealing shall notify in writing, the opposite party or his agent, at least ten days before the sitting of the next Court authorized to try the same, &c. It is insisted that the reading of the notice by the Sheriff is a substantial compliance with this statute. We do not think so. The general provision on the subject of serving notices in the progress of a cause, by reading the same to the party, does not apply in this case. The Legislature have thought proper to require a notice in writing.

It would not have availed the appellant any thing in this case however, had the notice been given in writing, instead of being read to the appellee. The appeal was taken on the 13th of July, and the sitting of the next Circuit Court thereafter, was by law fixed for the first Thursday after the third Monday in September, and the notice should have been given at least ten days prior to that term. It is no answer to say that the term lapsed, and the Court did not sit in September. Nothing of the kind appears on the record, and if it did so appear, it could not have been legally anticipated by the appellant.

The appellee did nothing to waive his right to notice. The subpoena may or may not have been ordered by him; and if ordered would of itself weigh but little.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

(123)

SCOGIN v. HUDSPETH.

1. A motion for a continuance is addressed to the sound discretion of the Court, and the Court will be held to have exercised that discretion soundly, unless it appear from the record that proper diligence has been used to procure the testimony of witnesses, or good cause be shown why such diligence has not been used.
2. Evidence that defendant had rented to plaintiff a farm on land belonging to the U. S. for thirty barrels of corn, which witness presumed was to be paid at next corn gathering time, held insufficient to support the plea of set-off and to have been properly excluded by the Court. (Note a.)

APPEAL from the Jackson Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action commenced in the Jackson Circuit Court by petition and summons by Hudspeth, the defendant in error, against Scogin, the plaintiff in error. The summons was served on the 21st of April, 1832, and the return term of the Court began on the 19th of June thereafter. The defendant pleaded in set-off amongst other things, "that the plaintiff was indebted to him" in the further sum of sixty dollars, for the rent of his, the said defendant's, farm by parol lease. The defendant also moved the Court for a continuance of the cause, on the following affidavit: "The defendant R. R. Scogin makes oath and says, that he cannot go safely into trial at this term of the Court, on the account of the absence of John S. Hunter, J. Dallermide, and ———, material witnesses who reside in the State of Alabama, by whom he expects to prove that a part of the matters offered in set-off, are due to him from said plaintiff; that he cannot prove the same facts by any other persons; that he has not had time to get their evidence at this term of the Court; and that he has a reasonable expectation to procure their testimony by the next term of this Court." The Circuit Court overruled the motion for a continuance.

The defendant then offered to prove, as a set-off under his plea, "that he had rented to the plaintiff a farm made on public land, that is, on land belonging to the general government, for thirty barrels of corn, which the witness said he presumed was (124) to be paid at the next corn gathering time." The testimony was objected to by the plaintiff's counsel, and excluded by the Court. The defendant in the Circuit Court excepted to the opinion of the Court, in refusing the continuance, and in rejecting the evidence offered in support of the plea of set-off. The plaintiff had judgment, to reverse which the defendant Scogin has appealed to this Court, and assigns for error,

First. The refusal of the continuance, and
Second. The rejection of the evidence offered.

A suit instituted under the petition and summons act, is triable of right at the return term, unless for good cause shown.

Motions for continuance are addressed to the sound discretion of the Circuit Court, and this Court must see that its discretion has been exercised unsoundly, before it will

The State v. Wilson.

reverse a judgment for that cause. For aught that appears in the record, the defendant by proper diligence might have procured the testimony to the return term of the Court; and no good cause is shown why he had not done so; nor any effort made to obtain the testimony.

The evidence offered in support of the plea of set-off, did not at all fit the case, or show any right on the part of the defendant to claim at that time, either thirty barrels of corn, or sixty dollars; and was, therefore, rightly excluded.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

M'GIRK, C. J., dissenting.

I dissent from that part of this opinion relating to the diligence the party should have used to entitle him to a continuance. In my opinion, it is not likely that any thing that could have been done between the time of the service of the process and the trial, would have availed any thing. As to the residue of the opinion, I concur.

(a.) A note given for a certain sum payable in *work*, cannot be set-off in an action founded on a debt due in money, although the debt accrued for the same kind of work stipulated for in the note. See *Prather v. McEvoy*, 7 Mo. R., p. 598.

(125)

THE STATE v. WILSON.

1. Where the record does not show whether the indictment was or was not correctly endorsed, the decision of the Circuit Court on that point will be held correct.
2. Unlawfully throwing down the roof and chimney of a dwelling house, in the peaceable possession of another, with force and arms, is an offence indictable at common law, and not one of those made cognizable before Justices of the Peace.

ERROR from the Cooper Circuit Court.

WASH, J., delivered the opinion of the Court.

At the June term of the Cooper Circuit Court, 1831, the defendant in error and one Davis were indicted, together with divers other evil disposed persons, to the number of two or more, to the jurors unknown. The indictment charges, that the defendants, on the tenth day of February, in the year one thousand eight hundred and thirty-one, in the night season, with force and violence, and with clubs, at the county of Cooper aforesaid, unlawfully, violently, forcibly, and furiously did throw down, and did pull down, the roof and chimney of a dwelling house, the property of the United States of America, and then and there being in the peaceable possession of

The State *v.* Wilson.

one Clarissa Hosty, and situated in the township of Booneville, in the county of Cooper aforesaid, the said Clarissa being then and there, and whilst the said Davis and Wilson and the others whose names are unknown as aforesaid, were pulling down and throwing down the said chimney and roof as aforesaid, in the said house, and put in great fear thereby, to the evil example of others, to the great disturbance of the peace, against the form of the statute in that case made and provided, and against the peace, &c. In the Circuit Court the defendant moved, first, to quash the indictment because no prosecutor was endorsed, which motion was overruled. He then moved to dismiss the cause, for the want of jurisdiction in the Circuit Court, the same being cognizable before a Justice of the Peace, &c., which motion was also overruled. The defendant then demurred and had judgment, to reverse which the State now prosecutes her writ of error in this Court.

(126) It is insisted by the Attorney General, that the Court erred in sustaining the demurrer; and by Mr. Haden for the defendant in error, first, that the Court erred in overruling the motion to quash and to dismiss, and that the judgment being for the right party must stand: and secondly, that no indictable offence was charged; that the offence was either a riot, "malicious mischief," or a private trespass. If a riot, then the indictment was defective, if a malicious mischief, it was not provided for in the statute on that subject, and if a private trespass, then not indictable at all.

From our inspection of the record, it does not appear whether the indictment was or was not properly endorsed, and the Circuit Court will be held to have decided correctly until the contrary is shown.

The offence as set out in the indictment, is not one made cognizable by statute before Justices of the Peace. The motion to dismiss was, therefore, rightly overruled. The indictment charges a most flagrant breach of the public peace by the defendant in error, in the commission of a forcible and outrageous trespass on property, in the peaceable possession of another. Miserable indeed would be the condition of society, if such fearful outrages were to be suffered to go unpunished, or left to be redressed only in civil actions for the private and individual wrong. The act of Assembly approved Jan. 18th, 1831, entitled "An Act declaring assaults, batteries, riots, routs, and unlawful assemblies, not indictable offences," does not reach the case. The offence is left as at common law, and the indictment sufficiently describes and charges it as such. No precise form or technical words are necessary. The Circuit Court erred, therefore, in sustaining the demurrer, and the judgment is reversed and the cause remanded.

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THE STATE v. MORRIS.

ON ERROR from the Crawford Circuit Court.

WASH, J., delivered the opinion of the Court.

Morris was indicted for forcible entry as at common law, and on demurrer had judgment. The decision in the above case settles the law of this. The judgment is reversed and the cause remanded.

SUPREME COURT OF MISSOURI.

MILLER v. BROWN.

3b	127
59a	5

3b	127
138	538

1. Where the Court or Justice of the Peace has jurisdiction of the subject matter, the ministerial officer is not bound to examine into the validity of the judgment, the proceedings or the process. It is sufficient for him that the judicial officer had jurisdiction of the subject matter. (Note a.)
2. Where the warrant set forth in the declaration, charged that the defendant had complained on oath, that two guns had been stolen from his "premises," and the warrant offered in evidence stated that two guns had been stolen from his "possession," the variation was held not to be material.
3. A search warrant, with a clause directing the officer to arrest the body of the person in whose possession the goods are found, is a legal and valid warrant.
4. An action can be sustained for an injury done to the character, by a malicious application without probable cause for a search warrant, on the ground that goods had been stolen and were concealed within a person's enclosure.
5. Probable cause is a mixed question of law and fact. The existence of the circumstances alledged to show probable cause, is matter of fact; but when the existence is found, whether they amount to probable cause is a question of law. The Court ought not to instruct the jury that probable cause has been proved; but should leave the weight of the testimony to the jury, unless the facts are agreed by the pleadings or submitted by the parties or the jury to the Court.
6. Where the Court refused to permit the witness to be asked "what was the common talk of the neighborhood where the plaintiff lived, as to his honesty or dishonesty," but permitted him to be asked "what was the general character of the plaintiff for honesty or dishonesty," it was held that there was no error; because the defendant was permitted to examine into the general character of the plaintiff; and if his question was to go beyond that object, it was properly rejected.
7. The notorious bad character of the plaintiff for honesty, is a circumstance which may be given to the jury with other evidence, to help in making out the defence of probable cause.

ON APPEAL from the Cooper Circuit Court.

WASH, J., delivered the opinion of the Court.

(128) This was an action commenced by Brown against Miller, in the Cooper Circuit Court, for a malicious prosecution, in which Brown had judgment, from which Miller has appealed to this Court. The declaration charges in substance, that the defendant falsely and maliciously, and without any reasonable or probable cause whatever, made a complaint on oath before a Justice of the Peace of Cooper county, that two guns had been feloniously taken, stolen and carried away from his said Miller's premises in said county, and that he had probable cause to suspect, and did suspect, that they were concealed in the enclosure of said Brown in said county, &c., and that upon such complaint the said Miller maliciously, and without any reasonable or probable cause, procured the Justice of the Peace to issue his warrant, directed to any Constable of Cooper county, whereby, after reciting the complaint,

Miller v. Brown.

the Justice commanded the Constable to enter in the day time into the enclosure of said Brown, and search for said property, and if upon such search he found the property, to bring it and the body of the plaintiff before him or some other Justice of the Peace of the county, to be dealt with according to law, &c., and that the defendant, under color and pretence of the execution of said warrant, went with the Constable to a certain place within the enclosure of the plaintiff, and falsely and maliciously, and without any probable cause, pointed out to the Constable certain goods, to wit: one gun then and there being, to be the goods charged to have been stolen, &c., and caused and procured the goods to be seized and taken and kept for a long space of time, and the plaintiff to be taken and imprisoned, &c., and to be carried in custody before the Justice of the peace who issued the warrant, by whom, after examination into the supposed crime, and after hearing what could be alledged, &c., said plaintiff was acquitted by said Justice, and discharged out of custody, &c., and that the defendant had not further prosecuted his said complaint, &c. The defendant plead not guilty, and on trial the plaintiff had verdict and judgment for two hundred dollars.

The facts as preserved by bills of exception, are in substance, "that the plaintiff (129) produced and read in evidence the original warrant charged in the declaration, to the reading of which the defendant objected. The warrant had the words "State of Missouri, county of Cooper, Cole Neck township," in the margin on the left of the paper, and on the right hand side of the paper the words "to any Constable of said county greeting," with a line or mark separating the words "State of Missouri," from the words "to any Constable of said county," and charged that said Miller had made oath, &c., that the guns had been stolen, taken and carried away from his "possession," instead of "premises." The affidavit of the defendant, the issuing of the warrant and the arresting, examining and discharging of the plaintiff, as charged in the declaration, were proven by the Justice, who stated that the defendant had applied to him for a warrant to search for his property, and not for the purpose of having the plaintiff arrested for larceny, &c. The defendant then proved that two guns had been stolen from him a few months before he applied for the warrant, and that before he applied for the warrant, the guns were found within the enclosures of the plaintiff, and that at the time the guns were taken from the defendant, and "at the time of his application for the warrant, the plaintiff was a man of notorious bad character for honesty, and suspected of stealing." Upon this state of facts, the defendant then moved the Court to instruct the jury,

First. That the jury must find, before they can find for the plaintiff, that the defendant instituted or carried on a prosecution against the plaintiff's person.

Second. That if they find that the defendant only applied for a warrant to search the enclosures of the plaintiff, and that the Justice issued a warrant to take the body of the plaintiff, that does not constitute the defendant a prosecutor as set forth in the declaration.

Third. If they believe from the evidence that the plaintiff was, at the time of the guns being taken, a man of notorious bad character for honesty, it is a circumstance which goes to show there was probable cause for the prosecution; which several (130) instructions the Court refused to give. The defendant excepted and now assigns for error the refusal of the Court to give the instructions prayed for.

In the progress of the cause, a witness was asked "what was the common talk of the neighborhood where the plaintiff lived, as to his honesty or dishonesty?" To

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which the counsel for the plaintiff objected, and the Court sustained the objection. The defendant excepted, &c. The defendant was permitted, however, to ask the witness what was the plaintiff's general character for honesty or dishonesty?

It is insisted by the counsel for the plaintiff in error, that the Court ought not to have admitted in evidence the warrant set forth in the bill of exceptions:

First. Because it does not run in the name of the State; and,

Second. Because it varies from that described in the declaration.

Whether the warrant runs in the name of the State or not, is a fact to be ascertained by inspection of the paper itself. There should be sufficient words properly arranged. In the case under consideration, there were apt and sufficient words; but the arrangement of them, as described in the bill of exceptions, would seem to be erroneous and improper. The cases of *Warner v. Shed*, 10 *John.* 146; *Parson v. Loyd*, 3 *Wils.* 341; and *Shirly v. Wright*, 2 *Salk.* 700, answer the objection fully, and establish the doctrine that where the Court or Justice of the Peace have jurisdiction of the subject matter, the Sheriff, Constable or other officer is not bound to examine into the validity of the judgment, proceedings or process, it being sufficient for him that they have jurisdiction. In this case the Justice had jurisdiction of the place, the person and the offence; and the process, though erroneous or defective, was valid as to the Constable. The objection to the admissibility of the warrant, on account of the variance, has no force.

The first and second instructions asked and refused, will be considered together. (131) Upon the complaint made before the Justice, it was his duty to issue his search warrant, with the clause directing the officer to arrest the person in whose possession the goods should be found, &c. It is the form prescribed and attached to our statutes and the one used at common law. The plaintiff might have had his action, if after the complaint made by the defendant before the Justice, the Justice had refused to grant him a search warrant. This action is to redress any damages the plaintiff may have sustained, either in his reputation by the scandal, in his person by imprisonment, or in his property by expense incurred; and it would have well lain upon the mere affidavit of the defendant, if made with malice and without probable cause; for assuredly an application for a search warrant, upon the ground that goods have been stolen and are concealed within a person's enclosure, is a sufficient scandal to the reputation to sustain an action as to this ground. The cases of *Elsee and Smith*, 16 *Eng. Com. Law, Rep. Cond.* p. 21; and *Boot v. Cooper*, 3 *Esp. Reps.* 144; *T. Rep.* 535, and 10 *John.* 273, sustain fully this position.

As to the third instruction prayed for, we think the Circuit Court ought to have given it to the jury. Probable cause is a mixed question of law and fact. Whether the circumstances alledged to show it probable or not probable, existed, is a matter of fact; but whether supposing them true, they amount to a probable cause, is a question of law: 1 *T. R.* 520 and 543, 2 *Taylor*, 123; 1 *Greenleaf*, 134. In *Crabtree v. Horton*, 4 *Munf.* 59, it was held that the Court ought not to instruct the jury that probable cause is proved; but should leave the weight of the testimony to the jury, unless the facts are agreed by the pleadings or submitted to the Court by the parties. The same doctrine is held in *Maddox v. Jackson*, 4 *Munf.* 462. In *Kelton v. Bevins*, *Cooke's Rep.* 90, the Court were divided in opinion on the question, whether probable cause would be a point for the decision of the jury or the Court. In *Newsam v. Carr*, 2 *Starkie's Cases*, 69, Baron Wood would not permit a witness to be asked whether the plaintiff's house had not been searched on former occasions,

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(132) and whether he was not a man of suspicious character. In 2 *Stark. Ev.* 917, it is doubted whether the defendant, after having given some evidence of probable cause, can give evidence to prove that the plaintiff was a man of bad character. In the case of *Rodriges v. Todmire*, 2 *Esp. Cases*, 721, *Lord Kenyon* admitted general evidence to that effect, (as cited in 2 *Stark. Ev.* 917, note X). *Mr. Starkie*, in his text, adopts the law as laid down by *Baron Wood* in *Newsam and Carr*; and *Mr. Phillips*, in his treatise on Evidence, vol. 1, p. 147, maintains the authority of *Lord Kenyon* in *Rodriges v. Todmire*. We have not had access to either of the cases as reported at length, and shall not attempt to reconcile them. In *Gregory v. Thomas*, 2 *Bibb*, 286, the Court lay down the law as settled in the case of *Rodriges v. Todmire*, and a majority of the Court are inclined to recognize the law as laid down by *Lord Kenyon*, and think that the Circuit Court in this case ought to have suffered the notorious bad character of the plaintiff to have gone (in connection with the other evidence) to the jury, as helping to make out the defence of probable cause.

As to the last point raised, the defendant was permitted to examine as to the general character of the plaintiff, which was all he had a right to do; and if the object of the question was to go beyond that, it was properly rejected by the Court. There was therefore no error in that. For refusing to give the second instruction prayed for, the judgment of the Circuit Court is reversed with costs, and the cause remanded for further proceedings in conformity with this opinion.

TOMPKINS, J., dissenting.

I do not concur with a majority of the Court in the opinion that bad character ought to be given in evidence to establish proof of probable cause.

(a.) See *Hickman v. Griffin*, 6 Mo. R., 40.
Davis v. Wood, 7 " " 165.

3 133
49a 494

(133)

LEWIS v. DAVIS.

The increase of live stock belongs to the person holding the particular estate, and not to the remainder-man.

ERROR to Randolph Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Lewis brought his action of trover against Davis in the Circuit Court of Randolph county. Judgment being there rendered for the defendant, the plaintiff sued out his writ of error to reverse that judgment. From the evidence saved on the trial of the cause, we learn that Lewis, the plaintiff below, and the plaintiff also in error, inter-married with Susannah Drinkard, the widow of Francis Drinkard, in April, 1830: that Francis Drinkard died some time in August, 1825, leaving a will by which it was provided that after paying all his debts, his wife Susannah should have, use and enjoy all of his estate, real and personal, for and during her life or widowhood, and that at her death or marriage, all of his estate, both real and personal, that might then be in existence, be sold, and the proceeds of the sale be equally divided amongst his children: that in September, 1830, the Court appointed the defendant in this action executor of the said will, revoking at the same time, letters of administration before that time granted to the plaintiff. The property sued for was the increase of the stock of horses, cows, hogs, &c., of the late Francis Drinkard. The Circuit Court instructed the jury that the widow, was not, by the will entitled to hold the increase of such stock after her marriage. The counsel for the plaintiff relies on 2 *Kent's Com.*, 294, and authorities there cited, also 1 *Haywood*, 235. *Kent*, after the writers on the civil law, says that the rule is, that the increase of animals goes to the person holding a particular estate in such animals, and that by means of Bracton, the rules governing the right of all which one's own property produces, have been introduced into the common law of England, and doubtless (he continues,) they now pervade these United States. The fruits of the earth produced naturally (134) or by human industry, the increase of animals, &c., are all embraced by this definition, viz: the produce of one's own property. The Roman law, he observes, and the civil code of Louisiana, make a distinction in respect to the offspring of slaves. *Haywood*, vol. 1, page 235 of his North Carolina Reports, speaking of the decision of the Court in the case of Glasgow and Flowers, viz: that the increase of a female slave, during the particular estate, went to the remainder man, says it is not certainly known why this opinion was first entertained in this country, since the rule with respect to all other animals is different, even in this State; for if other animals be leased for years and breed in the mean time, the lessee shall have the young as a part of the use; and he then cites authorities. Under the same head he says, that the rule concerning the increase of slaves, as above stated, is not so generally adopted; for in Maryland it is settled law, that negro children born of a mother given to A, for life, and after his death to B, in the lifetime of A, do belong to A, unless the increase are also given over by express words. On the other hand, *Roberts on Wills*,

Lewis v. Davis.

vol. 1, p. 380, says, it may be a question whether the legatee for life, (of live stock,) be not bound to keep up the stock for the benefit of his successor in interest, subject to the reasonable construction and use of the produce. Without such a rule as this suggested by the author last cited, it is very true that the old stock would in a few years be extinct. But we consider the law well established, that the increase belongs to the owner of a particular estate, and such being the law, it does not belong to this Court to look to the consequences. Whether the testator knew the law or not is quite immaterial. We must construe his will as if he knew it: and if we consider that in this country, men do not generally hold more of such property than is necessary to the comfortable subsistence of the family, the estate given by this will to the wife may not be worth as much as what the law would have given her, had she claimed her legal allowance. It seems to this Court then, that the Circuit Court erred (135) in instructing the jury, that the widow was not, by the will, entitled to hold the increase of the stock.

Judgment is therefore reversed, and the cause remanded for further trial.

MARTIN v. MILLER.

Where in an action of slander, the defendant pleaded in justification, the transcript of proceedings before a Justice of the Peace, dated 1st day of December, 1828, and offered in evidence a transcript dated the 8th day of March, 1828, the Court held that the variance was not material, as the date was not alledged as being descriptive of the transcript. (Note a.)

APPEAL to Howard Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Miller commenced his action of slander against Martin in the Circuit Court, and had judgment there. To reverse this judgment, Martin appeals to this Court.

In the Circuit Court Martin pleaded in justification, that said Miller ought not to have his action against him, because he says that before the speaking and publishing of the said words of and concerning the said William S. Miller in the said declaration mentioned, to wit: on the first day of December, 1828, at the Circuit and State aforesaid, at a Court holden before one William Black, a Justice of the Peace within and for the county of Ray aforesaid, in Crooked River township, in said county, &c. On the trial of the cause, the defendant offered in evidence to support his plea of justification, a transcript of the proceedings before the Justice of the Peace, dated on the 8th day of March, 1828, and not on the first day of December, 1828, when the pro-

Martin *v.* Miller.

ceedings were alledged in the plea to have been had. The Circuit Court refused to allow the transcript to be read in evidence, and the defendant's counsel excepted to the opinion of the Court, and this decision of the Court is assigned for error.

(136) Many authorities have been cited on both sides, to prove that the variance was material or immaterial, as it suited the view of either party. It will suffice to notice one cited by the appellee, inadvertently it must be supposed. In *3 Starkie*, 1598, the rule is stated to be, that when a particular fact is to be tried, a variance from the date will not be material, although it is proved by record, or other written instrument, provided the same be not alledged as descriptive of the record, by means of a *prout patet per recordum* or otherwise: and therefore, where, in an action for malicious prosecution, the plaintiff alledged that he was acquitted on a particular day, it was held that the precise day was not material, the substance of the allegation being, that the plaintiff was acquitted before the commencement of the action. *Purcel v. Macnamara*, 9 *East*, 157, (there cited). So where in an action on the case for not indemnifying the plaintiff, he alledged that B. afterwards, to wit., in Michaelmas term, in such a year, obtained a judgment against him; and on the trial it appeared that the judgment was of a different term, it was held that the variance was not material, the time not being alledged with a *prout patet per recordum*.

The defendant in the Circuit Court, appellant here, did not alledge the time when the proceedings were had before the Justice of the Peace as descriptive of the transcript of those proceedings. The Circuit Court erred therefore in refusing to permit the transcript to be read in evidence.

The judgment is therefore reversed and the cause remanded for further trial.

(a.) See *Stone v. Powell*, 5 Mo. R., p. 436.
Hibler v. Servos, 6 " " 25.

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DAVIS v. BARNES.

A. was in possession of a tract of land belonging to B. and raised a crop of corn on it. After the corn had arrived at maturity, but while it was standing on the ground, B. gave to A. the corn, and delivered possession of the standing corn so given to A. by delivering him possession of the land on which it grew. Afterwards, while the corn was standing on the land as aforesaid, B. entered upon the land and pulled and carried away, against the will and consent of A., ten barrels of said corn, and converted the same to his own use. An action of trover was maintained against B. for the recovery of the corn.

ON APPEAL from the Boone Circuit Court.

WASH, J., delivered the opinion of the Court.

Davis sued Barnes in an action of trover before a Justice of the Peace, for ten barrels of corn, and got judgment. Barnes appealed to the Circuit Court, where on a trial *de novo* the Circuit Court decided, that upon the evidence given in the cause, the plaintiff could not recover in an action of trover, and so instructed the jury. The plaintiff thereupon suffered a non-suit, and after moving, ineffectually, to set it aside, appealed to this Court. The testimony as preserved in the bill of exceptions is, "that during the year 1831, (Davis) the plaintiff was in possession of a tract of land belonging to the defendant, and raised a crop of corn upon it that year: that in the fall of the year 1831, after the corn had arrived at a maturity, and whilst it was standing on the land, the defendant gave the plaintiff the corn and delivered possession of the standing corn so given, by delivering him possession of the land on which it grew: that afterwards, and whilst the corn was so standing on the land as aforesaid, the defendant entered upon the land and pulled and carried away, against the will and consent of the plaintiff, ten barrels of the corn, which had been given to him as aforesaid, and converted the same to his, the defendant's, use." The only question for the consideration of this Court is, whether upon the proof offered, the plaintiff is entitled to recover in an action of trover? This question has been ably and elaborately argued by the counsel on both sides, and numerous authorities have been cited. Those mainly relied on by the counsel for the appellee to sustain the judgment of (138) the Circuit Court and the negative of the question, are 2 *Black. Com.* 407-8, 2 *B. & P.* 454, 2 *T.* 46, and 6 *East.* 609, and *Blackstone* says that corn "growing on the land or other emblems belonging to the possessor of the land who hath sown or planted it, whether he be owner of the inheritance or of a less estate: which emblems are distinct from the real estate in the land, and subject to many though not all the incidents attending personal chattels: the only incident of personal chattels to which such emblems are not subject mentioned by *Blackstone*, is that they are not the object of larceny before they are severed from the ground. In the case cited from 2 *B. & P.*, the agreement was "to sell the produce of twenty-two acres of hops-land and to deliver the hops picked, dried and put up in packets, &c." And the question was, whether it was an agreement relating "to the sale of any goods, wares and mer-

Davis *v.* Barnes.

chandizes within the statute of 23 *Geo. 3, C. 58, S. 1*, imposing a duty, &c., and the Court decided that it was not within the statute. In the opinion of the Court delivered in that case, it will be seen that they look to the subject matter of the agreement at the time the contract was made and lay great stress on the fact, that the hops were not then growing in the state of goods, &c., and that the agreement was rather for what the land should produce during the season, than for goods then in existence. The case of *Emmerson v. Heelis*, 2 *Taunt.* 38, arose under the provisions of the statute 44 *Geo. 3, C. 98*, imposing a stamp duty on certain agreements and exempting contracts for the sale of goods, wares and merchandizes, upon a sale at public auction to Heelis, of a quantity of turnips belonging to Emmerson. The question raised in that case was, whether the turnips growing were goods, &c., and exempted by the statute, or whether the sale conveyed an interest in the land, and, therefore, within the statute? The case was decided by Justice Mansfield, who placed it expressly upon the footing of the hop case above cited; for as much as the degree of maturity of the turnips was not shown, and from the time of sale it is clear that the turnips were not mature.

(139) The case of *Crosby v. Wadsworth*, 6 *East.* 601, is decided by Lord Ellenborough on precisely the same principles. In that case, the plaintiff on the 6th day of June, agreed by parol with the defendant, for the purchase of a standing crop of mowing grass, then growing on the premises of the defendant, which was to be mowed and made into hay by the plaintiff. The defendant afterwards refused to let the plaintiff have the grass, and cut and carried it away, &c. The plaintiff failed in his action, because as Ld. E. says in delivering the opinion of the Court, "the agreement stated conferring as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning lands." This is believed to be as far as the authorities have ever gone in support of the doctrine contended for by the appellee's counsel. On behalf of the appellant, the following authorities have been cited: 1 *Chit. pld.* 135; 1 *Burr.* 31; *Roberts on Frauds* 364-5, 126; *Gilbert's L. of Ev.* 214; *Toll L. Ex.* 148 and 194; 6 *East.* 610; 1 *Lord Raymond* 182; 2 *John* 52 and 420, in note; 7 *Mass. Rep.* 34; 9 *Cow. Rep.* 40; 2 *Kent's Com.* 355, 361-2; *Bac. Abr. Let. ex'r. and adm'r. letter H.* 3; 12 *Searg. and Rawle* 272; most of these authorities have been carefully looked into, and in the opinion of this Court establish conclusively the right of the plaintiff to recover in this action.

The judgment of the Circuit Court is, therefore, erroneous, and must be reversed, with costs.

3	140
40	652
3	140
159	522

(140)

COUNTY OF BOONE v. TODD.

- Where the County Court refuses to draw their warrant on the treasurer of the county, directing him to pay an account which has been allowed by the Circuit Court to the Clerk of said Court for office rent, a *mandamus* is an appropriate remedy to compel them to do so. (Note a.)
- Where a county has not provided a house in which to keep the office of Clerk of the Circuit Court, the Clerk is entitled to office rent from the county for a house furnished by himself.

ERROR from the Circuit Court of Boone county.

M'GIRK, C. J., delivered the opinion of the Court.

It appears by the record that Todd is Clerk of the Circuit Court of Boone county, and that the county of Boone has not provided any house to keep the Clerk's office in, and that Todd furnished a house for several years for that purpose; that he presented an account to the Circuit Court for rent of office, and that the Court allowed him one hundred and twenty dollars; that the Court ordered the County Court to order and direct the treasurer to pay the same. The County Court refused to do so. Todd then applied to the Circuit Court for a conditional *mandamus*, to which the County Court returned, in substance, as a reason why they did not order the allowance to be paid, that by law they had the right alone to audit demands against the county; and secondly, that by law the Clerk of the Circuit Court is not entitled to any rent of a house to keep his office in; but is bound at his own expense to provide the same. The Circuit Court then ordered and adjudged that a peremptory *mandamus* issue; whereupon the county of Boone took a writ of error to this Court.

The first point made by the Attorney General is, that a *mandamus* is not the proper remedy, because by law the county may be sued in an action; and that where the party has another specific remedy, a *mandamus* will not lie. It is conceded that this principle is correct as a general rule. We see no reason to apply that rule to this case. It may be true, that if the county is bound by law to furnish a room or house to keep the office in, that an action would well lie against the county, as the law has (141) provided for suing the county; but it is equally clear, that the Circuit Court is by express statute, to audit all the expenses against the county, incurred for books, stationery and other necessaries relating to the office of his Clerk. And with respect to these matters, when allowed by the Circuit Court, the County Court is bound by law to issue their warrant to the treasurer of the county, directing him to pay the same; and if the County Court refuse to order the warrant to be issued, a *mandamus* is, beyond doubt, an appropriate remedy.

The second objection is, that the demand allowed by the Circuit Court is not one which the county of Boone is bound to pay. The words of the statute are, "that each Clerk appointed as aforesaid, shall (where it has not already been done) procure a seal, purporting to be the seal of the Court of which he is clerk, with such emblems, &c., and a screw and other necessary apparatus for impressing the same, and

County of Boone v. Todd.

shall provide and safely keep and preserve suitable books, furniture and other necessaries for their respective offices, and keep regular and faithful accounts thereof; and the Courts respectively shall audit and settle such accounts, and allow, in their discretion, such sums as shall be reasonable for their expenditures under the provisions of this section; and all such allowances made to the Clerks of the Supreme Court shall be paid out of the State treasury, and all others out of the county treasury. See *Revised Code* 208, section 5. The Attorney General insists that the words in this 5th section, other necessities for their respective offices, cannot be made to include the house in which the business of the Clerk is transacted, so as to entitle the Clerk to rent or provide a house at the expense of the county; and that nothing of higher value or greater degree can be embraced by the words, than things of like kind. It is insisted by Mr. Kirtly, for the defendant in error, that a house for the office is to be included in the words, because the house is not the office; but that the office of a Clerk is made up of the authority the Clerk has to do particular acts relating to the public administration of justice, and the duties required of him to be performed by (142) the law relating thereto, and that a house is only an incident, as a book to record the judgments of the Court is an indispensable incident. We are of opinion that a house is a necessary incident; that no Clerk's office can be kept without a house to perform the duties in. The law requires the Clerks to perform certain duties and has provided specific fees in general, and it seems to us to suppose that the Legislature could intend that he should furnish a house to keep the books and papers in at his own expense, would be unreasonable. In some of the counties, as in St. Louis, the building a house would be an item of expense that would consume the emoluments of the office for several years, and in all the counties the land on which the house is to be erected must be bought or leased, for the Clerk would have no right to build an office on the public square of his own authority. Yet it is his duty to keep his office at the place where the Court is held, and to keep safely and securely all the books, papers, &c. This cannot be done without presses, desks, &c., and these are provided for by the act. Another thing is necessary, and that is a house, to put and keep these things in. It is the duty of the Clerk to provide this house, where none is provided; and how is he to do it? Shall he be compelled to take his own private property for public use without compensation? This would be contrary to the State constitution. See declaration of rights, act 13, section 7. Where is the Clerk's compensation for the use of the house? To say that the fees of office are his compensation, will not do. The answer to that is, the laws have given those fees as a compensation for services. And to say that the officer accepted the office, subject to this burthen, and is therefore bound to furnish the house at his own expense, would be paying a poor compliment to the wisdom and justice of the Legislature. If it be right to make him furnish the house without compensation, why is it not also right to make him buy the books, and furniture also, at his own expense? It is conceived no satisfactory answer can be given to this question. We cannot suppose then the Legislature would desire or intend to use private property in this way, for (143) public use. We, therefore, are of opinion, that the Legislature intend by the words *other necessities* to include the house in which the office is kept. The same General Assembly that passed this law, in the same session passed a law allowing the Clerks of the Supreme Court office rent, wherein nothing is said with regard to office rent being allowed to the Clerks of Circuit Courts; and the Attorney General insists that this circumstance furnishes evidence that the General Assembly did not intend

County of Boone *v.* Todd.

that these Clerks should be allowed any office rent. In construing the intention of the General Assembly in relation to this matter, we must look at the difference of situation of these two classes of Clerks. With regard to the counties, the law requires that they should have land, a public square at least, on which a Court House, jail and public offices are to be built. The offices to be built as soon as the condition of the county funds will admit of it. It is made the duty of the County Court, therefore, to provide houses for the public offices belonging to the counties, and until this is done, the county has no right to throw this burthen on the Clerk; but should pay rent unless some equivalent is given to the Clerk for the use of his house. But with regard to the offices of the Supreme Court, the case is entirely different. It is not the duty of the State to build public offices in every place the Supreme Court may be holden; nor would it be wise to do so; for the Courts are continually liable to be changed from one place to another; and as no offices or houses are required by law to be provided at the public expense in this particular, the Legislature have made an express and permanent provision on the subject. And by this provision it is clear, the Legislature clearly thought it unjust to require the Clerks to furnish the house. Why then is it less unjust to require the Clerks of the Circuit Courts to do so until the counties shall see fit to provide these houses? This view of the subject satisfies us that the Circuit Court did right in making the *mandamus* peremptory.

The judgment is affirmed with costs. The cause is remanded for further proceeding.

(144) TOMPKINS, J., dissenting.

Although I am much inclined to think that the Clerk of the Circuit of Boone county has a fair claim on the county of Boone for office rent, yet I am as much inclined to believe that the Legislature did not intend, by the 5th section of the act to provide for the appointment of Clerks of Court, &c., to authorize the Clerks to have such an account audited and allowed by the Circuit Court. And if that were not the intention of the Legislature, the Clerk could have no redress, on the refusal of the County Court to pay his account, but to sue the county.

I therefore think the judgment of the Circuit Court ought to be reversed.

(a.) See St. Louis County Court *v.* Ruland, 5 Mo. R., 270.

FENTON v. PERKINS.

3 144
58a 466

1. A note on John Mickle will not satisfy a contract for a note on John McMickle, unless it can be proven that the note on John Mickle was the one specially contracted for.
2. The Courts can take judicial notice of the abbreviation of a man's given name, without violence to the law of the land, but *quere* as to the family name.

ERROR to the Circuit Court of Boone county.

TOMPKINS, J., delivered the opinion of the Court.

This action was commenced by Fenton against Perkins before a Justice of the Peace. Judgment being given against Perkins, he appealed to the Circuit Court of Boone county, where judgment being given for Perkins, Fenton, for the second time, brings up the cause here to reverse the judgment of the Circuit Court. It was proved before the Circuit Court, that some time in February, 1830, the plaintiff and defendant traded with each other: Fenton gave Perkins a horse worth thirty or forty dollars for two notes, one made by Perkins himself to Fenton for five dollars, the other note (as the witness expressed it) on John McMickle for seventy-five dollars. The horse was delivered to Perkins, and he agreed to leave the notes with Dr. Ben-⁽¹⁴⁵⁾ net. Fenton, on application to Dr. Bennet, was offered two notes, one of which only he received, which was the note of Perkins; the other purported to be made by John Mickle. He refused to receive the last, alledging as a reason that he was entitled to have the note of John McMickle. To prove that the parties contracted for this particular note, the defendant gave in evidence that he had been seen by the plaintiff in error and others, to have some months before a note commonly called a Martin and McMickle note, several of which were said to be in circulation, purporting to be made by McMickle to one Martin, and which were thought to be of doubtful character; but it was not proved to be signed by John Mickle. Little other evidence was given. It was proved that the note when traded for was at Perkins' house, and was understood by Fenton to be already in existence, and there was no conversation about the time when it had become due, or whether then due, or when it would be due. This Court, when the cause was up before, decided that Fenton was entitled to a note signed by John McMickle, unless it could be proved that this note was specially contracted for. Lest the former decision of the Court should be misunderstood, it will be here observed that the Court decided that Fenton was, under the circumstances of this particular case, entitled to a note signed by John McMickle, and that his handwriting should be intelligible, unless it could be proved that this particular note was understood to be the subject matter of the contract, because it was considered that Perkins had no right to impose on Fenton the task of proving that Mickle was intended for McMickle. The abbreviations of a man's given name are so common, that, without any violence to the law of the land, the Courts may take judicial notice of them; but can it be said so of the family name? This name, it may be also observed, is abbreviated in the initial letters,

Fenton v. Perkins.

whereas the usual abbreviations are in the final letters. The majority of the Court is inclined to believe, that notwithstanding the small value of the horse, and the undisputed and well established solvency of John McMickle, that the testimony was (146) altogether insufficient to justify a jury to find a verdict for the defendant; and as the former verdict was given for the defendant, under the influence of directions of the Circuit Court, deemed by this Court to be erroneous, we think that the Circuit Court ought to have granted a new trial. Its judgment is therefore reversed, and the cause remanded to be proceeded in according to this opinion.

WASH, J. dissenting.

I dissent from the opinion of the Court. Looking at the record, I am not satisfied with the verdict of the jury. As a juror, I would not have concurred in rendering it; and as the Judge of the Circuit Court, I should probably have granted a new trial. But the question is now a different one. This Court will control the Circuit Court in the exercise of its discretion in those cases only, where it can see that that discretion has been clearly abused. In this case if the finding of the jury be improper, it is so because they have found without sufficient evidence, and not because they have found against evidence or the weight of evidence. The evidence on the part of the plaintiff shows that Fenton contracted for a note on John McMickle, and if the note left at Dr. Bennet's was signed by John McMickle, it was in fact and in law a note on John McMickle, though signed by the name of John Mickle. There was a good deal of evidence (not very direct it is admitted) tending to show the note left at Dr. Bennet's was the identical note contracted for; and not a tittle of evidence to show that it was not the note intended. Under the instructions of the Court properly given, the jury weighed the *sufficiency* of the proof, as was their province to do, and found in effect that it was the note contracted for, and there is nothing shown to preclude the jury from so finding reasonably. A mere dissatisfaction with the finding of the jury, will not in many cases authorize the Circuit Court to set aside the verdict and grant a new trial; and where we cannot see plainly that the finding has been against evidence, or without any evidence at all, we should take it that the Circuit Court has exercised its discretion soundly in refusing the new trial.

3	147
147	311
3	147
158	40

(147)

JIM (A SLAVE) v. THE STATE.

1. In a case of murder, being the slave of the Judge of the Circuit in which the indictment is found, creates such an interest in the Judge as will entitle the slave to a change of venue.
2. The statute law not only permits but makes it the duty of the Judge to change the venue in criminal cases, where the Judge himself has an interest in the cause.

ERROR to the Circuit Court of Howard county.

TOMPKINS, J., delivered the opinion of the Court.

At the February term of the Circuit Court for Howard county, for the year 1832, Jim was indicted for the murder of William B. Johnson, and pleaded not guilty, and issue was then joined. Afterwards he filed a petition for a change of venue. In this petition he stated that, at the time when this indictment was found, he was the slave of D. Todd, and that he still was his slave; and that said Todd, at the time of finding said indictment, was the Judge of the Circuit Court of Howard county, and that he still continued to be so. The Court did not grant the petitioner's prayer. He then moved for leave to plead the facts stated in the petition to the jurisdiction of the Court. His motion was overruled. He then, by leave of the Court, pleaded the same facts in bar of the prosecution. To this plea a demurrer was filed on the part of the State, and sustained by the Court. The prisoner was then put upon his trial, and being found guilty, a motion was made in arrest of judgment, and overruled by the Court; judgment was then pronounced, and to reverse this judgment the writ of error is prosecuted.

Leonard for the prisoner. "At the last term of this Court, a transcript of the record of the judgment was produced here, and the Court moved for a writ of error and supersedeas, which was granted. The record is now certified to this Court, and the plaintiff here has assigned for error,

First. The refusal of the Court to award a change of venue.

Second. The refusal of the Court to permit the prisoner to plead to the jurisdiction of the Court, the facts suggested in his petition.

(148) Third. The judgment of the Court for the State, upon the demurrer taken by the Attorney General to the prisoner's special plea in bar.

Fourth. The refusal of the Court to arrest the judgment on account of defect of jurisdiction.

At the last term, when application was made for this writ of error, it was objected on the part of the State, that a writ of error would not lie in treason or felony, and that if it would, it could only be brought with the consent of the Attorney General. That objection may be renewed at the present term, and will therefore now be answered.

The question might and perhaps ought to be considered at rest by the cases which have already been adjudged in this Court: (a slave) against the State, decided in the Second District at the term 1831, and Sams against the State, decided in this District at the last December term, are cases directly in point. In support of this jurisdiction,

Jim (a slave) v. The State.

tion, they were brought into the Supreme Court by writs of error, taken by the defendants below, to reverse Circuit Court judgments given against them upon indictments for murder, and in the first case the judgment was reversed, and in the last affirmed, and in neither case was the consent of the Attorney General asked or given. In *Callaway v. The State*, 1 Mo. Rep. 212, and *Blount v. Shepherd*, 1 Mo. Rep. 219, the opinions expressed by the Court do in effect affirm its jurisdiction in the present case; but it is not proposed at this time to rely upon the authority of these cases. The Constitution and laws of this State furnish ample ground to uphold this jurisdiction, independent of any construction which may have been given to our Constitution and laws by the judgments of this Court. The constitutional (amendments of 1822, 2 sec.) vest the judicial of the State in a Supreme Court, Circuit Courts, and such inferior tribunals as the General Assembly may from time to time ordain and establish. It then proceeds to distribute this power, and in art. 5, sec. 2, declares that the Supreme Court, except in cases otherwise provided in *that instrument*, shall have appellate jurisdiction only, which shall be co-extensive with the State, under the restrictions and limitations in the Constitution provided. These (149) restrictions and limitations are found in the 5th sec. of the 5th art., which provides that "the State shall be divided into convenient districts, not to exceed four, that in each district two terms shall be held annually, and that the Court when sitting in either district, shall exercise jurisdiction over causes arising in that district only;" and the excepted cases in which this Court is authorized to exercise original jurisdiction, are enumerated in the 3d sec. of the 5th art., where the Court has authority conferred upon it "to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, and other original and remedial writs, and to hear and determine the same." The appellate jurisdiction of this Court therefore extends over all the judgments both civil and criminal that are given in the Circuit Courts. For it is expressly declared to be *co-extensive with the State*. To whatever subject or place the original judicial power of this State will reach to that subject and to that place, the appellate jurisdiction of this Court extends also; your jurisdiction has the same extent and limits that the former has, and no other. And this great and extensive power is conferred upon this tribunal by the people, not by their agents; by constitutional, not by legislative enactment. The Legislature therefore cannot enlarge nor diminish it, they can neither add to nor take from it. And whenever a case of appellate jurisdiction arises, and the authority of this Court is invoked, the Court is bound to exert it, it cannot decline the jurisdiction. It is the constitutional right of every subject of the laws of this State to claim its exercise. Such is the view taken by the Supreme Court of the United States, of the power of that tribunal under the Federal Constitution, which in this particular is similar to our own. *Durosseau v. the United States*, 2 Pet. Cond. Rep. 382; *Marbury v. Madison*, 1 Pet. Cond. Rep. 283; but whether this Court can exert the power thus vested in it, without the aid of a legislative act providing the means by which it may be exercised, is a question certainly of great moment; but one that need not now be discussed. In *Chesolm's executors against the State of Georgia*, 2 Pet. Cond. Rep., (150) and in *New York v. New Jersey*, 5 Pet. U. S. Rep., 284, the Supreme Court of the United States appear to express and act upon the opinion, that the legislative act is necessary to give the powers of that Court activity. And the same opinion in relation to the powers of this Court, seems to have been entertained by the Court in *English v. Mullanphy*, 1 Mo. R., 780, and in *Blount v. Shepherd*, 1 Mo. R., 219, the

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appellate jurisdiction of the Court was exercised in a case where the Legislature have not merely failed to provide a writ by which it might be exerted, but had expressly withheld the necessary writ for that purpose; but, however, this question may be settled. The act of the General Assembly, 2 *Rev. L. Mo.*, 491, adopting the common law of England, and the 17th sec. of the 1st chap. of the act concerning "Courts," 1 *Rev. L. Mo.*, provide ample means by which this Court can exert its appellate jurisdiction over a final judgment of the Circuit Court given against a defendant on an indictment for murder. The former act, by adopting the common law, introduces into our jurisprudence a writ of error, and the latter act authorizes this Court in common with all other Courts, "to issue all writs which may be necessary in the exercise of their jurisdiction, according to the principles and usages of law." By these acts a writ of error is provided, and authority is given to this Court to issue it. By means of this writ, this Court may exert its appellate jurisdiction in the present case, if by the common law it is an appropriate writ for the revision of the present judgment. At common law a writ of error lies to every final judgment, whether civil or criminal, and to every award in the nature of a final judgment of a Court of record, proceeding according to the course of the common law. *Co. Lit.*, 288, 6 *Bac. Abr.*, title "error." The Queen *v.* Patty and others, 2 *Salk.*, 504; 2 *Ld. Rayd.* 1105; 3 *Mass. Rep.*, 187, 305; and in England a commission from the King issuing out of Chancery under his great seal, to the Judges of a Superior Court, authorizing them to examine the record, and on such examination to reverse or affirm the judgment according to law. *Bac. Abr.*, title "error." In furnishing this writ, the general law of the land has provided the means by which this Court can exert its constitutional jurisdiction over all the final judgments of a Circuit Court, and expressly authorized this Court to use the writ, if it is necessary, in the exercise of its jurisdiction. And to the objection that the Legislature did not intend to allow the writ in criminal cases, or they would have given it expressly, as they have in civil cases; the answer is obvious. If the constitutional power of this tribunal cannot be exercised, without some law prescribing the manner in which it should be exerted, it is as much the duty of the General Assembly to enact such a law, as it is the duty of the Executive to fill this Court with its constitutional number of Judges. And if a mode in which this Court can exert its constitutional power is prescribed in a general system of law which the Legislature has adopted, we cannot in decency presume that the General Assembly tacitly intended, in violation of its duty, to forbid this Court from adopting that mode of exerting its authority. Such a construction of the laws of the land, would be an unwarrantable reflection by the judicial department upon a co-ordinate branch of the government. And if this Court can entertain jurisdiction of a writ of error in any case where it is not expressly authorized by statute to do so, it will be no difficult matter to show how little ground those have to stand upon, who assert that this jurisdiction cannot be exerted over prosecutions for treason or felony, without consent of the Attorney General. If such was the law of the land, it would not only be a just reproach to our jurisprudence, but a strange anomaly in our legal system. That this tribunal, which was intended as the ultimate and great constitutional guardian of the rights of the citizen against all encroachments and violations, whether committed by individuals or by the government, and whose appellate jurisdiction the Constitution expressly declares shall be co-extensive with the State, should not be allowed to extend its protection to the life of a citizen put in jeopardy by a prosecution for treason or felony, unless with the con-

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sent of a particular officer of the government, to be given or withheld according to (152) his arbitrary will and pleasure, is a proposition well calculated to excite our astonishment, and those who assert it, ought to furnish undoubted proofs of its correctness, before they can expect to command for it our assent. By the laws of England, a party defendant cannot have a writ of error upon a judgment in treason or felony, without the consent of the King expressed by his Attorney General. These writs of error, in all civil cases, and also in all criminal cases other than treason and felony, are demanded of right and granted *ex debito justicie*. Even the King himself cannot refuse them. But in treason and felony, they are not writs of right, and are only granted with the consent of the King, expressed through his Attorney General. This consent it is true is now, however, rarely refused and is always given when a debatable question can be made upon the record, per *Lord Eldon* in *Mathews v. Warner*, 4 *Ves. jr.*, 207; but yet the writ is never issued without such consent. And hence it is argued that under our Constitution and existing laws, this Court cannot exert its appellate jurisdiction over a judgment in treason or felony, by means of a writ of error, without the like consent of the chief law officer of the State. Now it is to be observed, that according to the theory of the English law, it is the King's writ which confers the jurisdiction upon the Court to hear and determine the cause; and, therefore, in England a writ of error is not merely a process to remove a judgment from an inferior to a superior Court, but it is also the commission or warrant of the Sovereign to the Judges of the Superior Court which authorizes them to examine the record and reverse or affirm the judgment. All their authority over the judgment is derived from the writ, and without a writ they have no appellate jurisdiction; but the jurisdiction of this Court is derived from the Constitution and not from the writs which the Court is authorized to issue. These writs confer upon our Courts no authority, but are the mere instruments, the modes in which the authority already vested is exercised. It is not pretended in England, that a writ of error is not a common law mode of exerting appellate jurisdiction over judgments in treason (153) and felony; but it is the undoubted law of England that no appellate jurisdiction over any such case exists in any of their Courts, unless the Sovereign shall please to confer it, by issuing his writ of error for that purpose; but here the Constitution has already conferred the jurisdiction, and no authority can exist in any officer of the government to determine when these powers shall be exerted, and when they shall be dormant. Even this tribunal itself has no such discretion. Both the jurisdiction, and the obligation to exert it, if there is any mode prescribed by law, is imposed by the Constitution. There is therefore no analogy between the cases. It is manifestly no ground for inferring that this Court cannot entertain jurisdiction of a writ of error, in treason or felony, without the consent of the Attorney General: because the British King has, at common law, a discretion to grant or withhold at his will and pleasure, from his superior Courts, appellate jurisdiction over such cases. It may therefore, we think, be safely affirmed that this Court, under the Constitution and existing laws, has appellate jurisdiction over the present judgment, and is bound to exercise that jurisdiction by writ of error, independent of any consent to be given by the Attorney General, or by any other officer or department of the government. The question then will be whether there is any error in the record, and in the prosecution of this inquiry, we propose to raise only two points at present for the consideration of the Court.

First. That the Circuit Court erred in refusing to change the venue.

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Second. That the Circuit Court erred in giving judgment for the State, upon the demurrer taken by the Attorney General to the prisoner's special plea in bar. Upon the first point two questions will be made.

First. Whether there is any law in force, in making it the duty of the Circuit Court to award a change of venue, upon the facts suggested in the prisoner's petition for that purpose.

Second. Whether these facts, and the refusal of the Court to award a change of (154) venue, are so preserved in the record as to enable this Court to declare that there is error in such refusal.

In examining the first question, the attention of the Court will necessarily be called to the following acts of the General Assembly. The "Court Act" of the 7th January, 1825, 23 sec. 1 chap. (*Rev. L. Mo.*, 1 vol., 276), The "Venue Act" of the 16th of February, 1825, (2 *Rev. L. Mo.*, 786). The "Amendatory Venue Act" of 1829, (*Session Acts* of '28-'29, p. 59,) and the "Venue Act" of 1831, (*Session Acts* of 1830-'31, p. 93). The 23d section of the "Court Act," among other things, provides that no Judge of the Circuit or Probate Court, shall sit in the determination of any cause or proceeding, either civil or criminal, in which he is interested or related to either party, or who shall have been of counsel; but such cause or proceeding, if pending in the Circuit Court, shall be removed to some county where such objection does not exist according to law." It then proceeds to direct the mode of proceeding, where the cause is pending in the Probate Court, and concludes with the proviso, "that in no criminal cases shall the venue be changed, without the consent of the defendant." The 1st section of the "Venue Act" of 1825, authorizes a change of the venue in civil proceedings in certain cases, provides a mode of obtaining it by petition to the Court in term, or to the Judge in vacation; stating the facts verified by oath of the applicant, and also authorizes the Court to change the venue, without the application of either party, if the Judge is interested, or related to, or has been of counsel for either party." The 2d section provides, that any defendant in any indictment or information, shall be entitled to a change of venue, if he shall fear that he will not receive a fair and impartial trial, on account that the Judge is interested or prejudiced, or that the minds of the inhabitants of the county are prejudiced against him," and directs the mode of obtaining the change of venue, to be by petition to the Court in term, or to the Judge in vacation; stating the facts, and verified by affidavit. The 3d section of the act directs the mode of certifying the record when the venue is (155) changed in vacation, and expressly authorizes the Court to which the venue is so changed in vacation, to hear and determine the cause. This act contains neither of these provisions in relation to cases removed in term. The 1st section of the amendatory "Venue Act," directs the Clerk to do and perform all things when the venue is changed in term, which he is required by the 3d section of the amended act to perform where the venue is changed in vacation. And the 2d section directs the manner of certifying the record in criminal cases, where two or more are indicted and the venue is changed only as to one. These are the only legislative acts that have any bearing upon the question now under consideration, except the last venue act of January, 1831. If that act had never been passed, no doubt could have existed as to the obligation of the Court to have awarded a change of venue upon the facts suggested in the prisoner's petition. These facts disclose the existence of an interest in the Judge of the Howard Circuit Court, within the words of the 23d section of the "Court Act" of 1825. He was the owner of the slave about to be put

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upon trial for his life. Upon the issue of that trial depended his rights of property in that slave. Here then was a full, clear, direct and strong interest in the Judge, and although it was an interest in favor of the prisoner, it was yet an interest within both the words and spirit of the statute. It was both the policy and intention of the Legislature to provide a tribunal for the determination of criminal cases above all exceptions. A Court upon whose disinterestedness, not only the prisoner, but the whole community might repose with perfect confidence. The General Assembly has therefore prohibited an interested Judge from sitting in the determination of any criminal cause: and made it the duty of the Court to remove such cases to some county where the objection does not exist, provided the prisoner consents to such removal. This proviso was manifestly inserted to save the constitutional right of the accused, "a trial by a jury of the vicinage," which the Legislature *supposed* would be impaired by a removal of the cause without his consent. The Legislature prohibited (156) the trial of criminal cases before an interested Judge, and then went as far as they thought they constitutionally could go, to provide for the trial of such causes in a disinterested tribunal. In the case at bar, therefore, the interest of the Judge disclosed in the prisoner's petition, disqualified him from sitting in the trial of the case, ousted the Court in which he presided of all jurisdiction to hear and determine it, and made it obligatory upon the Court, if the prisoner consented, to remove the proceeding to some county where the objection did not exist. And by such an order of removal the Court designated in it to receive the cause, would have become possessed of it, and have acquired by necessary implication, jurisdiction to hear and determine it. But it is argued that if there is no authority in the Court where the cause originated, to remove it for trial into another jurisdiction, that then it must be tried in the county where it arose. Assuming for the present the correctness of this position, (which is, however, as we think, far from being a legal conclusion from the premises,) then the question will be, whether the authority given in the 23d section of the Court act, to remove a case where the Judge is interested, is taken away by any subsequent act of the Legislature. The last "venue act" of Jan., 1831, (session acts of 1830, 31 p.) repeals in express terms the venue law of 1825, and the amendatory venue law of 1829, and only authorizes the removal of causes in civil cases pending in the Circuit Courts where the Judge is interested or related to, or has been of counsel for either party, and provides the mode of removal. No part of the 23d section of the "Court act" is expressly repealed by this act. This is not pretended. The whole express repealing force of the "last venue act" is spent upon the venue act of 1825, and the amendatory venue act of 1829; but it is insisted that so much of the 23d section of the "Court act" as gives the authority to remove a criminal case, is repealed by implication, and the argument is that the "venue act" of 1825, and the amendatory venue act of 1829, are the only statutes which prescribe the mode of removing causes, and that as the prescribed manner of removing is taken (157) away, the authority to remove is extinguished by implication. Do the words "according to law" in the 23d section of the Court act, necessarily refer to the statute mode of removing causes? They are large enough to embrace a common law, as well as a statute mode. Besides, this argument is not altogether correct in point of fact. For the 23d section of the Court act gives authority to remove a criminal case where the Judge is related to, or has been of counsel to a party, and yet neither the venue act of 1825, nor the amendatory venue act of 1829, prescribe any statute mode for the removal of such causes; but there is no necessity for pressing

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this objection against the argument. For admitting that the venue law of 1825 did prescribe a mode for the removal of every class of cases directed to be removed by the 23d section of the Court act, does it follow that the repeal of a particular statute mode of removing causes, is a repeal by implication of an independent statute, directing the cause to be removed? If the 23d section of the Court act had merely directed the causes therein enumerated to be removed, without prescribing the manner of removal, either expressly or by reference to some other statute, would the enactment have been void? In the case supposed, would not the will of the Legislature have been sufficiently manifested, and would the Courts have been at liberty to disappoint that will, because the particular mode of removal was not pointed out? Whenever the judicial or any other department of the government is authorized or directed to do an act, all the means necessary to accomplish the act, are given by implication. This is a general principle of construction and of universal application. In construing constitutional grants of authority, it is always held that where a power is granted, the means of executing the power are granted by necessary implication. And the same principle is expressly recognized by the common law as applicable to the construction of statutes. Whenever a provision of a statute is general, every thing which is necessary to make such provision effectual, is supplied by the common law. *Bac.* (158) *Abr.*, title "statute," letter B. and 1st Inst. 235, and 2nd Inst. 222, are cited. "Whenever a power is given by a statute, every thing necessary to make it effectual is given by implication." *Bac. Abr.*, title "statute," letter B. and 12 Rep. 130-1, and 2 Inst. 306 are cited. And these things are said to be incidental to a statute. Now if the 23d section of the "Court act" would have been effectual, although no mode of removal had been prescribed in that or any other statute, does the venue act of 1831, which repeals the venue laws of 1825 and 1829, in which the mode of removing cases is prescribed, repeal by implication so much of the 23d section of the "Court act" as directs criminal cases in which a Circuit Judge is interested, to be removed out of his jurisdiction? If the 23d section of the Court act would have been effectual and valid without the aid of the venue laws of 1825 and 1829, is it not clear that the repeal of these laws cannot touch the validity of the authority to remove conferred by the Court act? Repeals by implication are never favored, and we have no hesitation in saying, that it would be the duty of this Court, if the case required it, to struggle hard against an implied repeal of the section under consideration. If the authority conferred by this section is extinguished, a Circuit Judge must either try a case in which he is directly and deeply interested, or offenders of the highest grade may go unpunished for want of a competent tribunal to try them. It is against natural equity and the moral sense of mankind to permit an individual to sit in judgment in a case in which he has a clear strong interest. And the same strong feeling of impropriety is excited in the community by permitting high offenders to go unpunished for want of a disinterested tribunal to investigate their guilt and inflict the penalty. It has been held even in England, where parliamentary omnipotence is acknowledged, that a statute against natural equity is void, and the very case taken as an illustration is that of an act of Parliament making a man judge in his own causes. *Bac. Abr.*, titled "statute," letter A. Even those English writers who deny this general doctrine, admit that where some collateral consequence arises out of (159) the general words of a statute, which is unreasonable and contrary to natural law, the Courts are in decency to conclude, that this consequence was not foreseen by Parliament, and therefore they are at liberty to expound the statute by equity and

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quoad hoc disregard it. And therefore they say that if an act of Parliament gives a man power to try all causes that shall arise in his manor, of Dale, it shall be so construed as to exclude him from exercising jurisdiction over his own case, although it arises within the manor. 1 Black. Com. 91. And if a statute ought to be construed against the express letter in order to avoid the gross impropriety of giving an individual jurisdiction over his own cause, surely this Court will not favor a repeal by implication, when the effect of such repeal is to bring upon the laws of this State the just reproach either of compelling a Circuit Judge to sit in the trial of a cause in which he is interested, or of failing to provide a disinterested tribunal for the trial of an individual upon an accusation of murder. We submit, therefore, whether this Court will not affirm the truth of these propositions. That the 23d section of the Court act of 1825 is in force, and untouched by the repeal of the venue acts of 1825 and 1829. That the facts suggested in the prisoner's petition disclose an interest in the Judge of the Howard Circuit Court within the meaning of that section, ousted the Court of its jurisdiction to hear and determine the case, and made it the duty of that tribunal, if the prisoner consented, to remove the cause for trial to some jurisdiction where the objection did not exist. And that in the absence of any statute mode of removal, it was competent for and the duty of the Court to provide a mode.

The other question involved in the point now under consideration, is, whether the disqualifying facts suggested in the prisoner's petition, and the refusal of the Court to remove the cause to some other jurisdiction, are so preserved in the record as to enable this Court to pronounce that the Circuit Court erred in refusing the change of venue. The record shows the fact, that after the cause was put at issue, and before the calling of the jury, the prisoner applied to the Court to remove the cause. It (160) also discloses the facts upon which that application was predicated, by preserving in the record the petition in which they are alledged; and it contains the proceedings and judgment of the Court upon the application. So far there would seem to be no difficulty. The application, the suggestions of fact in the petition, and the refusal of the Court to award a change of venue, are all in the record, and must be considered as facts of the record. Upon what principle are these things to be rejected, as forming no part of the record of the present suit? What is the record but a history of the proceedings of the Court in the case? Many cases of the removal of criminal prosecutions occurred in our Courts under the venue act of 1825, and in all those cases was not the application for the change of venue, the suggestion of facts in the petition, and the judgment of the Court awarding or refusing a change of venue, part of the record of those suits? Was this ever denied, and can it be denied? In such a case, how is the Court in which the indictment was found, discharged upon the record from its obligation to determine the cause; or how is the Court to which the cause is removed invested upon the record with jurisdiction to try it, unless the application, the facts suggested in the petition, and the award of the Court are to be considered as part of the record? If, under that statute, upon a sufficient suggestion of facts, a Circuit Court had refused a change of venue, or had allowed a change upon an insufficient suggestion of facts, would not there have been error in the proceedings, to which the appellate jurisdiction of this Court would have extended? And yet, how could this Court have exerted jurisdiction, without considering the application, the facts suggested, and the allowance or disallowance of the change of venue as parts of the record? And how is the case at bar to be dis-

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tinguished from the case put? It is true that in the case put by way of illustration the cause is removed in the mode prescribed by a statute; but in the case at bar, no statute mode of removal exists. But can this difference make any distinction between the cases, as to the question whether the proceedings had upon an application for the (161) removal of a cause, shall be considered part of the record? The statute prescribing the mode of removal, does not expressly declare that these proceedings shall be a part of the record; but yet they must be, and are so considered. They are material proceedings in the correct determination of the cause; they are proceedings in which the inferior Court may commit error to which the appellate jurisdiction of this Court extends, and over which it cannot be extended without so considering them; and they are capable of being and are in point of fact sufficiently preserved in the record. To the objection that from aught that appears upon the record, the change of venue may have been disallowed because the matters suggested in the petition were untrue in point of fact, it might perhaps be answered that the verification of the petition by the oath of the party, ought to be considered conclusive as to their truth not only in analogy to what the Legislature prescribed in the venue act of 1825; but also to avoid the gross absurdity of suffering a Judge whose jurisdiction is contested on the score of interest to try the question as to the existence of that interest; but admitting that the oath of the applicant is not to be considered as conclusive and that the truth of the facts may be contested, the question then is, whether this record shows that the change of venue was disallowed, because the matter suggested was untrue in point of fact or because it was insufficient in point of law to warrant the removal of the cause to another jurisdiction? There were only two legal modes of disposing of the prisoner's suggestion, a *demurrer* and a *traverse*. The latter would have brought up the question of fact, whether the matter suggested was true, and the former the question of law, whether, admitting it to be true, it was sufficient in law to warrant the removal. Now if the record shows that the suggestion was not disposed of upon a traverse which raised the question of fact, then of course it must have been disposed of upon a demurrer, which admitted the truth of the facts; but contested their sufficiency in point of law to warrant the removal of the cause. But if there had been a traverse of the facts, there must have been a trial (162) of the traverse by a jury, not only because such is the mode of trial for ascertaining the truth of facts in criminal prosecutions, prescribed by the common law and sanctified by the constitution; but because there was no other mode of trial in this case, which did not involve in it gross absurdity, of permitting a Judge to try the preliminary question of his interest in order to determine the ultimate question of his jurisdiction. And if there had been such a trial of the truth of the suggested facts, there must have been also in the history of the suit a record of such trial and verdict in order to have justified the Court upon the record, in refusing to remove the cause and in proceeding therein to find judgment and execution. But this record shows no trial and no verdict of a jury, affirming or negativing the truth of the suggested facts. The conclusion, therefore, is in accordance with the truth of the case, that the matter of the petition was disposed of upon an *ore tenus demurrer*, admitting the truth of the matter, but contesting its sufficiency in point of law to warrant the removal of the cause to another jurisdiction. Such too is a fair interpretation of the entry in the record containing the award of the Court upon the matter. And in this view of the case, it is now perfectly immaterial whether the facts suggested in the petition were true or false. If the judgment of the Court refusing to remove the

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cause was given upon the question of law, and was in point of law erroneous, that judgment must now be reversed.

Second point. The second matter relied upon as error in the record, is the giving of judgment for the State upon her demurrer to the prisoner's special plea in bar. The matters stated in this plea are the same that were suggested in the prisoner's petition for a removal of the cause, and are here relied upon as a bar to the prosecution against the prisoner in the Howard Circuit Court. And the only question is whether they constitute a good bar? Whenever a Court has no jurisdiction over the cause, the facts disclosing that defect of jurisdiction constitute a good plea in bar. This doctrine is founded on plain legal principles laid down by elementary writers and (163) supported by the adjudged cases. In *1 Chit. Plead.* 427, it is said that when a Court has no jurisdiction at common law, or it has been taken away by act of parliament, such want of jurisdiction may be pleaded in bar or given in evidence under the general issue. In *Parker v. Elding*, (1 *East. R.* 352,) which was an action of assumpsit in King's Bench, a verdict was taken on the trial for the defendant, because the jurisdiction of the Court had been taken away by act of parliament, and the Court when moved for that purpose refused to set aside the verdict. In Pennsylvania the Courts put a stop to the proceedings at *any stage*, on its being shown that they have no jurisdiction. *Mamhardt v. Soderstrom*, 1 *Bin. Rep.* 138. *Moon v. Wait*, 1 *Bin. Rep.* 219. In the federal Courts it is well settled, that want of jurisdiction may be taken advantage of by demurrer, or upon the trial, by motion in arrest of judgment, or upon writ of error. *Wood v. Waynam*, 1 *Cond. Rep.* 335; *Capron v. Van Noorden*, 1 *Cond. Rep.* 370; *Manvalet v. Murray*, 2 *Cond. Rep.* 19; *Turner v. Enrille*, 1 *Cond. Rep.* 205; *Catlett et al v. Pacif. Ins. Com.*, 1 *Payne Rep.* 594, cited in note 1 *Cond. Rep.* 171. It is even held that party in the federal Courts may reverse his own judgment upon writ of error, where the want of jurisdiction in the Court rendering the judgment is manifest on the record, *Capron v. Van Noorden*, 1 *Pet. Cond. Rep.* 370. Nevertheless, federal judgments are not considered absolutely void like the judgments of an English inferior Court, unless the jurisdiction of the Court appears on the face of the proceedings, but only voidable by writ of error or other direct process brought to repeal them. *McCormich et al v. Sullivan et al*, 10 *Wheat.* 192 cited in note, in 1 *Cond. Rep.* 208. Now do the facts alledged in this plea disclose a defect of jurisdiction in the Howard Circuit Court to hear and determine the case at bar? We shall here assume upon the argument which has already been submitted, that the 23d sec. of the "Court act" is in force and unimpaired by the repeal of the venue acts of 1825 and 1829. That the facts disclosed in this plea show an interest in the Judge of the Howard Circuit Court within the meaning (164) of that section, and that the interest ousted the Court of its jurisdiction, to hear and determine the case. And if these propositions are true, the validity of the plea seems to be unquestionable. English pleas in abatement to the jurisdiction of the Courts of Westminster Hall, are founded altogether upon different matter, and have no bearing upon the present question. The ground of those pleas is not the defect of jurisdiction in the Superior Courts; but the *personal privilege* of the party to be sued in another jurisdiction, provided he insists upon the privilege in due time, and in a proper manner. The Courts of Westminster Hall have undoubted jurisdiction over all the cases where pleas in abatement to the jurisdiction can be taken; but at the same time there is a *concurrent* jurisdiction existing in another Court, which may become exclusive in any particular case, by being set up in that case in due sea-

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son and in a proper manner; but there is nothing of that kind here. The 23d sec. of the Court act does not confer a mere personal privilege upon the defendant, but limits the jurisdiction of the Circuit Courts in the cases therein enumerated. It does not require the defendant to claim a removal of the cause as a mere personal right, a favor intended for him, which he may forfeit unless he insists upon it in due season and in a proper manner; but expressly takes away all jurisdiction to hear and determine, and makes it obligatory upon the Court to remove the cause to some other tribunal, without requiring the defendant himself to stir in the matter. It is argued however that the prisoner may, according to the proviso, prevent a removal of the cause by withholding his consent to it, and that in that event the Court has, by necessary implication, jurisdiction to try it. Now admitting that a Judge may acquire by mere implication power to try his own case, and that therefore the Howard Circuit Court might have acquired jurisdiction to hear and determine the present prosecution, by the prisoner's refusal to consent to its removal, yet that does not touch the validity of this plea.

The matter alledged in it brings the case within the body of the act, and so ousts (165) the Court of its jurisdiction, and if the Court acquired jurisdiction by implication growing out of the proviso, upon the prisoner's refusal of his consent to the removal of the cause, the State ought to have brought the case within that proviso, by showing in her replication such refusal of consent on the part of the prisoner. If the cause had been removed without the application of the prisoner, his consent to the removal must have appeared upon the record, and so when the cause is retained under circumstances that *prima facie* require its removal, the prisoner's refusal of his consent to the removal ought also to appear upon the record, in order to justify the Court there, in retaining the cause and in proceeding in it to final judgment and execution. So that in either event, whether the Court had or had not jurisdiction upon the prisoner's refusal to consent to the removal, the plea is good, and the judgment against it upon the demurrer erroneous.

"Wells, Attorney General, for the State." As no other objections were made below, it is presumed that nothing else will be assigned for error, but the overruling the prayer for a change of venue, and sustaining the demurrer.

First. As to the overruling the motion to change the venue by the act of January 15th, 1831. The former laws, which allowed a change of venue in criminal cases, were repealed; and by that act a change of venue was allowed in civil cases; but by that act the Court must be satisfied of the truth of the statements. So by the common law, the Court must always be satisfied of the truth of the causes alledged, and that the party could not receive a fair trial: 1 Chit. Crim. Law, 494-5, and page 201, 136. Whether the Court upon hearing the evidence was satisfied, or ought to have been satisfied, does not appear. It may well have been that the Judge knew the slave not to be his. That he never owned him, or had sold him, or freed him, or these matters may have been proved by the State, or the defendant may not have adduced sufficient proof of the facts stated. The Circuit Court is always presumed to have decided correctly, until the contrary appear. So we must presume in this (166) case. For aught we can see in the record, the refusal of the Court to direct a change of venue was correct, there can be no error in that: Butcher v. Keil and Butcher, 1 Mo. Rep. 262, and Davis v. Hays, 1 Mo. Rep. 270. But there is another objection to the party obtaining a change of venue, which is that by pleading the general issue he puts himself upon the country—that is upon a jury of the county—

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that is of Howard county, and it was too late to ask a change of venue—he waived his right to a change of venue: *Tidd's Prac.* 553; 3 *Bos. and Pul.* 12; *Talmash v. Penner*, *Wheaton Rep.* 221; *Patterson v. U. S.*, 1 *Cond. Rep.* 208, in note 2. Here the application is founded on the 23d section of the act establishing Courts of Justice, and prescribing their powers and duties, (approved 7th January, 1825,) which makes the consent of the defendant in a criminal case necessary before the venue can be changed—and it must either be the privilege of the Court to change it, with the consent of the defendant, or the privilege of the defendant himself. If the privilege of the Court, then the Court did not choose to exercise it. If the privilege of the defendant, then he did not choose to exercise it; but by appealing to a jury of Howard county, he waived his privilege. The above section applies both to civil and criminal cases, and it applies to the Supreme, Circuit and County Courts; and there are three causes for the change of venue, where the Judge is interested or related to either party, or has been counsel. Can this provision mean that the party to whom the Judge is related may object, or the party in whose favor the Judge is interested may object, or the party for whom the Judge may have been counsel may object, and in either of those cases against the wish of the party supposed to be injured, claim a change of venue. This too where the Court is willing to try the case. The act aforesaid says that the Judge shall not sit; but that the cause shall be removed to some county where the objection does not exist according to law, referring either to an act on the subject of changes of venue then before the General Assembly, or pre-⁽¹⁶⁷⁾ pared by the revisors as a part of a system, or to an act to be passed on the subject. If it referred to an act then before the General Assembly, entitled an act to provide for changing the venue in civil and criminal cases, (*Dig.* 786,) only the party who could be injured had the right to apply for the change for the causes enumerated in the section under which the change of venue is now claimed, or the Court might change it. If it referred to an act yet to be enacted, or to such provisions as might be enacted, then the act cannot be carried into effect allowing the change of venue, until the method and manner are pointed out or until provision is made. If it referred to the common law, then the Court must be satisfied of the truth of the matters alledged, and that the party could not get a fair trial without the change of venue. It must be obvious to every one, that the General Assembly never intended that a party who could not possibly be injured by a cause, which if it injured any person would alone injure the opposite party, should make that cause a pretext for changing the venue against the protest of the party who alone could be injured. Neither the common law, nor any statute law, ever authorized such a thing. The venue could only be changed by the Court itself, (out of delicacy,) or upon the application of the prisoner, who was, for the causes alledged, not likely to get a fair trial unless he procured or was allowed a change of venue. Here even the Court could not change the venue without the consent of the defendant: as to construction of statutes, 1 *Cond. Rep.* 340, *Faw v. Merstetter*; and 1 *Cond. Rep.* 422, *U. S. v. Fisher*; and 1 *Cond. Rep.* 348, *Pennington v. Coxe*. Suppose in a civil suit the plaintiff should alledge that the Judge of the Circuit Court had once been his counsel in that cause, and should make that a pretext for changing the venue to some other Circuit—and the defendant should object to the change of venue—could it be error for the Court to refuse the change of venue? The thing cannot be supposed—the Legislature could not have intended it: for they have said the venue shall be changed according to law, and by the law the application must come from the party

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likely to be injured. Even by the former law in regard to changes of venue, the (168) party applying must give reasonable notice of his application to the adverse party, or the Court could not hear his application; that was not done in this case as to the plea in bar. It will appear from the statute that the objection is only to the Judge sitting, and the remedy is the change of venue. The indictment was properly found in Howard—and could not be removed except by the consent of the defendant. There is no want of jurisdiction in the Court, for if the Judge should sell the negro or free him, or if the Judge should die, or resign, or be removed, then the trial could be held and had in Howard, or remanded if changed to another county. The Court is not divested of its jurisdiction: 1 *Cond. Rep.* 208, in note 2; *Wheaton*, 221; the Court tried the cause and said the party waived the right, &c. If the Court has no jurisdiction of the subject matter, then the plea would be good. But here it is a mere personal privilege of the defendant to have his cause removed, and not an objection to the jurisdiction of the Court. If the plea in bar to the jurisdiction would be good, then the same objection might be urged on the trial of the plea of not guilty—it being nothing but an argumentative plea of not guilty. It cannot be necessary to argue to this Court, that a mere personal privilege to have the trial of a cause removed, could procure the acquittal of a felon—that it would be equally good on the general issue, upon trial: see 1 *Ch. P.* 427–8–9; 1 *Condensed U. S. R.* 170, *Bingham v. Cobbett*; 3 *Dall.* 382 and 370, *Capron v. Noodin*; 2 *Cra. Rep.* 126; 6 *East*, 597, *King v. Johnson*. The reason why a want of jurisdiction can be taken advantage of on the trial, or in a plea in bar, is, that consent cannot give jurisdiction. But here consent can give jurisdiction, because the cause cannot be removed without such consent, and a consent was given by pleading the general issue, and referring the trial to a jury of Howard county: see cases above referred to in 1 *Cond. Rep.* 370 and 770. The refusal of the Court to change the venue, can only be noticed by this Court in two ways.

First. By saving the evidence and the objection on the trial of the matters alledged in the petition.

(169) Second. By applying to this Court to compel the Circuit Court to remove the cause before trial, by *mandamus* or *certiorari*.

Third. It will appear from the statute, and also from what has been said above, that the General Assembly, first, could not have intended that the person who could not be injured by the cause being tried when the indictment was found, should procure a change of venue to another county on that account, as the act says "it shall be removed according to law," and all the laws that have been enacted, or ever will be enacted, confine the objection or application to the person likely to be injured. In some cases allowing the objection to come from the Court, which might be done by the Court in this case, (by consent of the defendant, as a matter of delicacy,) but which the Court could not be compelled to have done—and the not doing of which would not be error, or it was merely the expression of an intention on the part of the General Assembly to make provision for changes of venue in such cases; but until such provision should be made, the Court could not remove the cause: or if the General Assembly did any thing more than express an intention to make provision for the change of venue, then it referred the change to the act of the same session and a part of the same system, (on the subject of venue,) and by the repeal thereof, they intended to disallow changes of venue in criminal cases. For no person can suppose that the General Assembly could have intended that a murderer

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should not be tried at all, and therefore escape punishment for a crime that strikes at the root of society. For a Court to impute such an intention to the General Assembly of this State, would be unwarrantable. As the Courts are to be governed by the intention of the General Assembly in construing statutes, it follows that they cannot give such a construction as they could not suppose the General Assembly intended to be given. In construing statutes, it is always fair for the Court to put themselves in the place of the General Assembly, and then inquire, could he have intended such a construction to be given; they must also take the whole statute and every provision together, to find the meaning of the General Assembly. The letters of the statute will not prevail if the cause is not within the spirit of the law, or the matter is not within the mischief: 1 *Cond. Rep.* 340, 348, 422, in notes above referred to. In Kentucky they have statutes allowing a change of venue for certain causes, (not unlike our own,) at least before the repeal of the late acts; and in construing which the following matters have been decided. In *Owens v. Owens, Hardin R.* 158, the Court of Appeals decided that where a change of venue had been improperly obtained, and the cause thereby awarded to another county, the party objecting or wishing to object to the change of venue, on account of its having been improperly obtained, must make his objection on his first appearance in the county to which the cause is removed; that it is like a plea to the jurisdiction of the Court. In *Ship v. Gale, Hardin R.* 224, the Court decided that the order for the change of venue must be filed thirty days before the term, otherwise the party will not be entitled to it. (This shows that the cause for the change of venue does not affect the jurisdiction of the Court as to the subject matter, and that it may be waived.) In *Baker v. Hopkins, 1 Marshall's Rep.* 587, the Court decided that both the Court from which the venue has been changed, and that to which it has been changed, have jurisdiction of the subject matter; and any objection on account of the venue cannot be made after verdict—it is too late. In *Brooks and others v. Clay, 3 Marshall's Rep.* 546-7, and in *7 Littell's R.* 262, the Court decide that erroneous proceedings in regard to a change of venue, never make a discontinuance; and also decide (547) that where the venue has been improperly changed, and the party would object on that account, he must be held to the same strictness in point of time as he would be in a plea in abatement, and the objection must be made at the first convenient hour. In *Jones v. Greegett, 1 Bibb Rep.* 448, the Court decided that where the venue had been improperly changed, (the petition, &c., not being sufficient,) and the party appeared and pleaded in chief, it was too late to object to the jurisdiction of the Court, or move to strike the cause from the docket. In *Deering v. Halbut, 2 Littell's Rep.* 292, the Court decide that where all the necessary steps had been taken to change the venue, and the order made for that purpose and filed, yet if the party went on with the trial without objection, he could not afterwards object to the jurisdiction. An examination of the statutes on the subject, and the above cited authorities, fully establish these propositions.

First. That the General Assembly did not intend that a murderer should not be tried at all. If he is to be tried, he must either be tried where the indictment is found, or there must be a change of venue; that the indictment can only be found where the offence was committed.

Second. That the General Assembly by repealing the laws upon the subject, did not intend there should be a change of venue in a criminal cause; but if they intended that there should be a change of venue in such cases, yet they never in-

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tended, nor did the common law intend, that the party should object to the Judge, because he was interested in procuring his acquittal. *Tidd*, and 1 *Chit. Cr. Law*.

Third. That if the General Assembly intended a change of venue in such cases, (that is, criminal cases,) it must be changed according to law. By which they mean either the law contained in the Revised Code and part of the same system, (*in fore materia*), or a law to be enacted, or the common law; and by none of these could the party in whose favor the interest operated, or for whom the Judge had been counsel, or to whom the Judge was related, obtain the change of venue: and by the law as it existed at the time the change was asked, (statute 1831,) and by the common law, the Judge must be satisfied of the truth of the matters alledged for change of venue.

Fourth. That whether the Judge was satisfied of the truth of the matters contained in the petition, or ought to have been satisfied, does not appear on the record. 1 *Mo. Rep.*, 262, 270.

Fifth. The matters alledged as cause for changing the venue, do not affect the jurisdiction of the Court as to the *subject matter*; but are mere objections to the Judge. That the jurisdiction of the Court, both as to the person of the defendant and as to the subject matter, is undeniable.

Sixth. That the changing the venue is a privilege which the defendant may waive, (like the privilege of the scholars of Oxford and Cambridge, not to be sued in any Courts but those of their respective Universities).

Seventh. That the defendant did so waive it by pleading in chief and appealing for trial to a jury of Howard county. *Tidd*. 3, *Bos. and Pul.*, 1 *Cond. Rep.*, and *Ken. Rep.*

Eighth. That the plea in bar is nothing more than an argumentative plea of not guilty—and the same matters would, if the plea be good, have procured his acquittal on the trial of the plea of not guilty. 1 *Ch. P.*; 1 *Cond. Rep.*, 170, 370; 6 *E. R.*, 597.

Ninth. That if the plea in bar be good, the defendant could not and cannot be tried at all for the felony and murder.

Tenth. That the only true rule in construing statutes, is to take them all and every part of each together, and find what was the intention of the General Assembly—and to say that the General Assembly did not intend that a murderer should not be tried at all, and that because he objected to being tried on account that the Judge was interested in procuring his acquittal, is an absurdity so great, and a disrespect for the legislative branch of the government so flagrant, that it deserves no argument to refute it. 1 *Cond. Rep.*, 340, 422, 348.

Eleventh. That there are two kinds of objections to the jurisdiction of the Court—one a personal privilege which may be waived, and to assert which there must be a plea to the jurisdiction of the Court in abatement, or by motion equivalent, which is the first step in a cause; the other is an objection to the Court taking cognizance of the cause on account of its not having jurisdiction of the *subject matter*, or in some cases of special or limited jurisdiction, that it has not jurisdiction of the *person*. That the objection to the jurisdiction on account of the Court having no jurisdiction of the subject matter, or having none of the person of the defendant, cannot exist in this case. For if this Court has not the jurisdiction, then no Court has it. This last plea may be in bar, or the matter may be given in evidence under the general issue.

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Twelfth. It is manifest that the General Assembly did not intend that the interest of the Judge should cause a failure of justice: for in the same section which directs the venue to be changed in case the Circuit Judge be interested, it is also declared that where a Judge of the Supreme Court is interested or has been counsel, or is related to either party, he shall not sit in the cause, *provided a Court can be formed without such Judge.* By which it is certainly intended that he shall sit, although interested, if a Court cannot be formed without him; and this, too, where there has already been a trial of the cause in the Circuit Court. But it is contended for the defendant, that if the Circuit Judge be interested, he shall not sit, although there could be no trial unless he sat: nor does the petitioner show that he does not expect a fair trial, therefore it is not sufficient either at common law or under the old statute, or under the new statute. It has already been remarked, that if the plea in bar (to the jurisdiction) be good in law, the defendant could not be tried at all for the felony and murder; and I will add, that if it be good, there can be no change of venue, this being a consequence of the other proposition. I will, to make this more clear, add a few words to what has already been said, although it is like attempting to prove that two and two make four. The defendant could be indicted in no other county than Howard, that being the county where the offence was committed, and therefore the grand jury of no other county could take jurisdiction of the matter—they being sworn to inquire only for the body of their county. When the indictment is found in Howard, the defendant appears and pleads in bar to the jurisdiction of the Court, that the Judge is interested. If the plea be good, the *only* judgment that can be given it is that the prosecution be barred. Surely it cannot be pretended that the (174) Court could give judgment that there be a change of venue—for that would not be the object or prayer of the plea, nor an answer to the plea—if the plea be good, it is good to *bar* the prosecution. Every indictment that could be found by the grand jury would be thus pleaded to, and thus barred; so that the defendant could not be tried at all for the felony and murder. Nor can it be pretended that by demurring, the State confesses the facts stated and set forth in the plea, for any other purpose than as to the plea itself. The amount of the admission is nothing more, than admitting all the facts stated in the plea to be true, yet they do not bar the prosecution. It would be going back to the horn book of the law to attempt to prove that the admission implied in the demurrer can have any other effect. The very form of the demurrer shows this—"that the said plea and the matters and things therein contained, and as therein pleaded and set forth, are not sufficient in law to *bar* or preclude the said State from having and maintaining said prosecution." The whole matter may be summed up in a few words:

First. The petition for a change of venue came too late, as shown by the reason of the case, by analogy and by the authorities cited expressly in point.

Second. That if in time, yet there is nothing on the record, (no evidence being saved,) to show that the facts alledged in the petition were true or were proved on the hearing of the motion for a change of venue, or to show that they were not disproved.

Third. That the change of venue was a personal privilege not affecting the jurisdiction of the Court, as proved by the authorities cited.

Fourth. That as it did not affect the jurisdiction of the Court, it could not be good as a plea in bar.

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Fifth. That if the plea in bar be good in law, it bars this prosecution, and a like plea would bar any and every prosecution that could be commenced; and therefore the defendant could not be punished at all for the felony and murder.

Sixth. That the only judgment that can be given on the demurrer to the plea, (if (175) it be good in law,) is, that the prosecutions be barred, and no judgment can be given that there be a change of venue.

Seventh. That the demurrer to the plea cannot help the petition or motion for a change of venue, nor will the consent of the defendant to the change of venue be of any effect, unless the matters stated in the petition be true; and whether true or false this Court cannot tell.

It is assigned for error:

First. That the Circuit Court erred in refusing to change the venue.

Second. That the Court erred in sustaining the demurrer to the prisoner's plea in bar. By the 23d section of the act to establish Courts of Justice, and to prescribe their powers and duties, it is provided that no Judge of the Circuit or Probate Court shall sit on the determination of any cause or proceeding, either civil or criminal, in which he is interested, &c. But such cause or proceeding, if pending in the Circuit Court, shall be removed to some other county where the same objection does not exist, *according to law*. See *R. C.*, 276. The act of 16th February, 1825, to provide for the change of venue in civil and criminal cases, provides in the 2d section, that when any defendant in an indictment in any Court of this State, shall fear that he will not receive a fair and impartial trial in the Court in which the trial is pending, on account that the Judge is interested or prejudiced, such party may apply to the Court in term time for a change of venue by petition, setting forth the cause of such application, &c., and the Court shall award a change of venue to some county where the causes complained of do not exist. See *R. C.*, 787. The act of 22d January 1829, contains nothing material to this cause. (See p. 59.) By 4th section of the act to provide for changing the venue in causes cognizable in the Circuit Courts, approved January 15th, 1831, it is enacted, "that the act entitled an act to provide for the changing of the venue in civil and criminal cases, approved 16th February, 1825, and the act amendatory thereof, approved on the 22d day of January, 1829, be repealed," and by that act no further provision is made for a change of venue in criminal causes. (176) The questions to be settled by this Court, are:

First. Did the prisoner make out such a case of interest in the Judge, as would entitle him to a change of venue, supposing the law be not repealed?

Second. Did he make his application in a proper time and manner?

Third. Is there any law to authorize a change of venue?

First. The prisoner filed his petition, stating that he was the slave of the Judge of the Court: he pleaded the same thing in bar of the prosecution; and the plea being demurred to, the truth is admitted. The law, in prescribing the duty of the Judge in such case of interest, directs that such cause shall be removed to some county where the same objection does not exist. See 23d section *Revised Code*, p. 276; and the act 16th February, 1825, above cited, authorizes the prisoner to apply to the Court for a change in such cases. In the first statute cited, it seems to be the duty of the Court to act whenever it may acquire information of the interest; and in the second statute the prisoner is authorized to bring the facts before the Court in a particular manner, and to require its action. The interest is such in the opinion of this Court as would entitle the prisoner to a change of venue. For on the one hand the policy

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of the law and the interest of the government require that a Judge should not be exposed to the temptation of doing wrong by sitting in a cause where he is interested; for thereby it would seem to be probable that a corrupt Judge would favor the acquittal of the guilty, and that a well disposed Judge might, if he were not a very firm man, be tempted to be too severe in the administration of the law, that he might avoid the imputation of partiality: on the other hand, the prisoner might fear that he could not have a fair trial either from a Judge interested in his conviction or acquittal, according to the character of the man. So that the law seems to be satisfied if an interest exists.

Second. We are of opinion that he did make his application in due time. By the 23d section of the act to establish Courts of justice, R. C. 276, the Circuit Court is (177) directed to change the venue whenever this interest exists: and by this act it is not less the duty of that Court to look to such matters, than by the act 16th February, 1825, to provide for the change of venue in civil and criminal cases, it is the right of the prisoner to claim such change of venue. This is not like to the case pleading to the jurisdiction of the Courts of common law in England. In those cases, individuals sometimes have peculiar privilege of being sued in particular Courts, and if they do not claim such privilege, the policy of the law requires that they should be supposed to abandon that privilege for the present purpose. But can it be supposed to be the policy of the law that a Judge should sit in a case where he is interested. By such a construction of the law, a father might sit in judgment on his son. The Court then is of opinion that the application was made in due time: and the facts are well preserved on the record by the plea in bar.

Third. Is there any law to authorize the change of venue.

The repealing act of 15th January, 1831, repeals only the acts of 16th February, 1825, to provide for change of venue, and the act of 22d January, 1829, in amendment thereof. These acts, it will be remembered, made it the duty of the Circuit Court to allow a change of venue, whenever the prisoner would make the affidavit required by law, but did not repeal the 23d section of the act to establish Courts of justice above cited, by which the Courts are required to change the venue whenever cause shall appear to exist. Now there might be good reason to repeal the one, and to leave the other provision unrepealed. If prisoners, by false affidavits, procured a change of venue, it were good reason perhaps to repeal this provision and leave still the Circuit Court the power to change, whenever facts could be proved to authorize such change. But it may be said that the 23d section above referred to, provides that the cause shall be removed to some county where the same objection does not exist, according to law, and that all the venue acts being repealed, there are now no statutory provisions to direct the removal. This objection seems to have little weight; (178) it would be better to reject those words altogether, than to suppose the Legislature meant that a Judge should sit in a cause where he was interested. But as well observed by the counsel for the prisoner, there is other law than statute law in this State. The Legislature might well have meant that the cause should be removed in such manner that it could be tried agreeably to law, (i. e.,) proper papers sent, and that the cause should be properly certified: for which purpose it is thought that the common law and a sound construction of the above cited section of the act to provide for establishing Courts, &c., would afford ample means. The Court, then, is of opinion that the statute law not only permits, but commands the Circuit Court to change the venue in a criminal cause, when an interest, such as is shown in this

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cause, is shown to exist. The Circuit Court then, in the opinion of this Court, erred in sustaining the demurrer to the prisoner's plea in bar to the prosecution, and its judgment passing sentence of death on him is therefore reversed: and the Circuit Court is directed to remove the cause to some county where the same objection does not exist.

Decisions of the Supreme Court of Missouri.

ST. CHARLES DISTRICT, APRIL TERM, 1828.

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At the April term of the Supreme Court, for the year 1828, held at the town of St. Charles, within and for the second judicial district in the State of Missouri, the following opinion was given by the Judges and is now (Dec. 1832) directed to be published, to-wit:

DEVORE, TO THE USE OF SIMONDS, GUARDIAN OF REIN AND REIN, v. PITMAN.

1. An administration bond being joint and several, may be put in suit by any person aggrieved, against any one or all of the obligors; and the security may be sued as soon as the principal commits a breach of the condition, and before conviction of the principal either by judgment or verdict.
2. A breach setting out a failure to make annual, and a failure to make final settlement, is well assigned.
3. Permission from the Court to an administrator "to retain in his possession the money of minors, paying lawful interest therefor," in pursuance of the act January 21st 1816, does not cancel the obligation to make annual and final settlement, or interfere with the power or duty of the security to compel him to do so, after the expiration of the time for which the money was loaned.

ON A WRIT OF ERROR to Circuit Court of Montgomery county.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of debt commenced against the defendant as security in an administration bond, executed on the 11th of October, 1813, by one Hight as principal, with the defendant Pitman as his security.

The condition of the bond is set out in the declaration, and seven breaches assigned in substance.

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First. That said Hight did not account, &c.

Second. That the Circuit Court at the October term, 1815, gave the administrator (180) permission to retain \$616 12 (the balance found in his hands upon settlement) for one year, on lawful interest, and that Hight had neglected and refused to account for the same at the expiration of the year.

Third. Breach is stated as the second, with an averment that Hight did not administer the sum of \$616 12 according to law, but converted and disposed of the same to his own use, &c.

Fourth. That divers goods and effects, amounting to \$2,000, came to the hands and possession of said Hight to be administered, which he did not administer according to law, but converted to his own use, &c.

Fifth. That divers sums of money, goods, &c., amounting to \$2,000, came to his hands and into the hands of others for him to be administered, which he (Hight) wholly neglected to administer and account for, but converted to his own use, &c.

Sixth. That said Hight had never made annual settlements, or any final settlement of his accounts, by reason whereof the guardian had been put to great trouble and expense, in attempting to bring or compel him to make settlement, &c.

Seventh. That the County Court at August term, 1824, finding in said Hight's hands the sum of \$1222 62, unadministered, ordered him to pay over the same to the guardian, which he wholly neglected and refused to do.

The defendant plead generally, *non est factum* and *nil debet*, on which issues were taken and found for the plaintiff.

To the first breach the defendant pleaded, that said Hight did account, &c., on which issue was taken and found for the plaintiff, and his damages assessed to one cent.

To the sixth breach the defendant demurred and had judgment.

To the second and third breaches the defendant pleaded two pleas.

First. *Oneravi non*, because the Court had given Hight leave to retain and use the money without his (defendant's) consent, and thereby had discharged the security.

(181) Second. *Oneravi non*, because he was the mere security of said Hight who had not been convicted by judgment or verdict of any waste or mismanagement, or of not settling or administering according to law, &c.

To the fourth and fifth breaches the defendant pleaded *oneravi non*, because, &c., as in the second plea to the second and third breaches.

To the seventh breach the defendant pleaded three pleas—two substantially the same as those pleaded to the second and third breaches, and the third plea, that said Hight made no settlement with the Court at the August term, 1824, and that said Court did not find said sum of \$1222 62 in the hands of said Hight due said estate, &c.

The plaintiff demurred to all the special pleas, and the defendant had judgment, to reverse which the plaintiff now prosecutes his writ of error in this Court.

The administration bond is joint and several, and may be put in suit by any person aggrieved against one or all of the obligors, and it has been decided by this Court, that the security may be sued so soon as the principal commits a breach of the condition, and that no conviction by judgment or verdict is necessary. The Circuit Court erred, therefore, in overruling the plaintiff's demurrers to the second plea of the defendant to the second and third breaches—the pleas to the fourth and fifth breaches, and to the third plea to the seventh breach. The sixth breach is sufficiently assigned.

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The party by law was entitled to special damages, if any were incurred; and the Circuit Court erred in sustaining the defendant's demurrer thereto.

The Circuit Court erred also in overruling the plaintiff's demurrs to the first pleas of the defendant to the second and third breaches, and to the second plea of the defendant to the seventh breach.

The permission which the Court gave Hight to retain and use the \$616 12 for one year, did not cancel the obligation to make annual and final settlement, nor interfere with the power or duty of the security to compel him to do so, after the expiration (182) of the year. It might be that the permission to retain and use the money would occasion the loss of it. It might, however, be employed to great profit. Whether in the case under consideration, profit or loss resulted from the permission to retain and use for one year, &c. does not appear.

Upon the whole, the judgment of the Circuit Court is erroneous and must be reversed, and the cause remanded for further proceedings conformably to this opinion.

Decisions of the Supreme Court of Missouri,

BOWLING GREEN DISTRICT, DECEMBER TERM, 1832.

DEVORE, TO THE USE OF SIMONDS, GUARDIAN OF REIN AND REIN, v. PITMAN.

1. A. became the security of B. in an administration bond. Afterwards a law was passed authorizing administrators, by leave of Court, to retain in their possession the money of minors, paying lawful interest therefor. B. obtained leave, in pursuance of this act, to retain money due the estate on which he had administered. During the time the Court allowed him to retain it, B. became insolvent and wasted the money. In a suit against A., the surety, to recover the amount, he was allowed to prove that his principal had wasted the money during the time for which it had been loaned him by the Court.
2. When a guardian put an administrator's bond in suit for his *own use*, he was allowed to recover only costs paid by himself; to recover the portion due his ward, it was held necessary to put the bond in suit for *their use*.

(Judge McGirk retiring from the bench.)

APPEAL from Circuit Court of Montgomery county.

TOMPKINS, J., delivered the opinion of the Court.

(183) This was an action of debt on an administration bond, made by Henry Hight, administrator of James Rein, dec'd, and said Pitman as his security, to Uriah J. Devore, Clerk of the Court of Common Pleas of St. Charles county, commenced by said Devore (suing for the use of N. Simonds) against said Pitman.

The judgment of the Circuit Court was for Devore, and Pitman appeals to this Court to reverse it.

The declaration commences thus: "Uriah J. Devore, formerly Clerk, &c., who sues to the use of N. Simonds, as guardian of Susannah Rein, William Rein, and

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James Rein, late of the county of St. Charles, dec'd, by his attorney complains of said Pitman, that he the said Irvine S. render unto, &c.

The declaration then sets out the date of the bond, which is the 11th of October, 1813, and the condition of the bond according to the statute of that day.

The breaches assigned are :

First. That Hight did not render an account of his administration according to the condition of this bond.

Second. That at the October term of the County Court for St. Charles county, in the year 1815, there was found in the hands of Hight on the settlement of his accounts, the sum of \$616 12 due to the said estate, and that the Court gave him leave to retain the same as administrator, paying interest thereon for one year, and that at the end of the year he did not account for it.

Third. This is the same as the second, except that it charges that Hight did not well and truly administer, &c.; but converted and disposed of the money to his own use.

Fourth and Fifth. That goods, &c., to the value of \$2000 came to the hands of Hight and others for him, and that he wasted them, &c.

Sixth. That Simonds had, as guardian, incurred costs and charges in bringing Hight to settlement, but that he had made neither annual nor final settlements.

Seventh. That at the August term of the County Court for the year 1825, held in the county of St. Charles, that Court, on a settlement of Hight's accounts, found in (181) his hands, belonging to said estate, the sum of \$1,222 50, and ordered him to pay it over to said Simonds, guardian as aforesaid, and that Hight did not pay it.

On the first trial of this cause in the Circuit Court, the plaintiff had judgment for the penalty of the bond \$2,000, and his damages were assessed to one cent on the first breach. To the other breaches the defendant pleaded specially, and the plaintiff demurred to his pleas, and the Court overruled the demurrers. The cause was then brought into this Court by appeal, and the judgment for the defendant being reversed, it was remanded. On its return into the Circuit Court, the defendant pleaded to the second and third breaches, that during the year he was permitted to retain the money, Hight became insolvent and unable to pay. Demurrers being sustained to these pleas, he filed other pleas, which also were demurred to, and the demurrers were sustained.

To the fourth, fifth, sixth and seventh breaches, he pleaded that Hight had neither at the commencement of this suit, nor at any time since, any goods and chattels of said estate to be administered, &c.

The defendant also demurred specially to the sixth breach, because it set out two causes of action, viz : a failure to make final, and a failure to make annual settlements.

He pleaded also to the seventh breach, that the sum of \$1,222 50, alledged to have been found in Hight's hands, was the amount of the said sum of \$616 12 in the second and third breaches mentioned and interest thereon, and averred that during the year that Hight was permitted to retain the same, he became insolvent. To each of these pleas the plaintiff demurred, and then joined in the demurser of the defendant to the sixth breach, and he had judgment on all the demurrers.

The defendant then withdrew his pleas to the fourth and fifth breaches, and filed other pleas, on which issue was taken. He then filed several other pleas, at different times, to the seventh breach, which it will not be material to notice here, and to

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(185) which demurrers were sustained. The plaintiff took a non-suit on the fifth breach, and issues joined on the fourth and seventh breaches being found for him, damages were assessed on them as well as on the others to which the defendant had pleaded, and the pleas were decided on demurrer to be insufficient.

The errors assigned, and which it is material here to notice, are :

First. That the Court erred in sustaining the demurrers to the pleas filed at the March term of the year 1829, and which have been before set out.

Second. That the Court erred in overruling the defendant's demurrer to the sixth breach.

Third. That the Court erred in giving judgment for the plaintiff, appellee here.

First. The demurrer to the joint plea of the defendant to the fourth, fifth, sixth and seventh breaches, ought to have been sustained. The plea to the second and third breaches, and the separate plea to the seventh breach, it will be recollected, stated that the money in those breaches mentioned, had been loaned by the County Court to Hight for one year, and that during that year he had become insolvent and unable to pay. By an act of the Territorial Legislature, approved 21st January, 1815, (see section 60, p. 150, of the pamphlet edition,) "executors, administrators, &c., may, by leave of the Court, retain in their possession the money of minors, paying lawful interest therefor." This law took effect more than one year after the execution of the bond, and it is not contended that by any law in force at the time of the execution of the bond, the administrator could have retained the money on interest. It seems just, then, that his security should be allowed to proved that the money sought to be recovered of him was wasted by his principal during the year for which the Court had loaned it to him; for had Pitman known that Hight would be indulged in using the money of the estate, he might not have been willing to become his surety. For it is one thing to be the surety of a mere trustee, and another to be the surety of a trader or speculator. But it is contended that after the demur-
(186) rers were sustained to these pleas, one issuable plea was filed to the seventh breach, and some (which it will be admitted were not good) were filed to the breaches, to which the plaintiff demurred and had judgment on his demurrer; and that these pleas first filed must be considered as withdrawn. We do not consider that it is material whether the pleas were filed at the same time or even at the same term. It is enough for the defendant that the Court allowed him to plead. Had he filed all his pleas at the same time, and had judgment on any one of them, that judgment would have been a bar to so much of the action as it defended against, and the circumstance of the pleas being filed at different times, and even after a judgment on a demurrer to a former plea makes no difference. Had the Court abused its discretion in permitting the defendant to amend, the plaintiff might have made his objections there, but not having done so, and the Circuit Court having permitted him to plead without withdrawing his former pleas, it cannot now be objected to. The Circuit Court then, we think, erred in sustaining the demurrer to the pleas to the second, third, and seventh breaches.

Second. Error when this cause was before in Court the sixth breach was decided to be well assigned here; and we see now no reason to change that opinion, and think there is no error here.

Third. That the judgment was for the appellee.

At common law, if an infant sues or defends by his guardian, the guardian must have a warrant, and must be admitted by the Court; and if the infant sues by guar-

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dian or *procchein amy*, without saying in the declaration "by the Court here specially admitted," it is error: see 2 *Saunders*, p. 117, note 1.

The act concerning minors, orphans and guardians, approved 8th February, 1825, section 5th, provides that all guardians, duly appointed, shall be allowed and received without further admittance to prosecute and defend for their wards as occasion may require.

The act of 21st January, 1815, has a similar provision, couched in the same words, (187) to which is added this further provision: "and if any person who is a minor, who has a right to sue shall wish to sue, it shall be lawful for such person to sue by his next friend, where none has been appointed, without any formality other than the next friend acknowledging the same in open Court after the action is commenced, and the minor agreeing to the same in open Court, if above the age of fourteen, and if under that age the Court to allow such person to continue as guardian or next friend."

We do not think the Legislature ever intended by either of these provisions to make any change in the mode of suing, or in the character of the plaintiff; but only to enable the guardian to come in with less trouble to prosecute for the minor. The minor is the owner of his property, and he sues for any injury done to it by his next friend or guardian.

The 8th section of the acts establishing Courts of Common Pleas and for other purposes, approved 20th August, 1813, requires that "bonds heretofore required by any law of this Territory, to be taken in the name of the Judge of Probate, shall, as well in vacation as in term time, be taken in the name of the said Clerks of the Courts of Common Pleas respectively, and the bonds so given may be put in suit and prosecuted from time to time, by and at the cost of any party injured by a breach thereof, until the whole penalty be recovered thereupon." Different provisions at different times have been since made as to the person to whom bonds are to be made, and the same provisions have been made as to the right of persons injured to put such bonds in suit. The question here is, who is the party injured, Simonds or his wards? It is our opinion that Simonds is only injured in having to pay costs. And having put the bond in suit for his own use, he was entitled to recover only on the sixth breach the costs he had paid. To recover the portion of his wards, he ought to have put the bond in suit for their use; for the ward is the real plaintiff, and the person who would sue, were it necessary to institute an action for an injury to the real or personal property of such ward, and the guardian is no more than the counsel (188) assigned by operation of the law to conduct that suit.

The interposition of Devore, as Clerk of the Court of Common Pleas, makes no change in the character of the wards; they are the persons injured by the withholding of their portion, and the suit ought to have been instituted for their use, to enable the Court to give judgment for such portions. It appeared in the testimony saved, that the Circuit Court received in evidence, on the second, third, fourth and seventh breaches, a record of the County Court of St. Charles county, to enable the jury to assess damages on those breaches, and that the defendant excepted to the decision of the Court, under which that evidence was admitted. In this we are of opinion that the Circuit Court erred, since in our opinion he was not entitled to recover on those breaches.

For these errors the judgment of the Circuit Court is reversed and the cause remanded for further proceedings in conformity with this opinion.

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COOPER v. MARLOW.

1. In an action for slander, it is sufficient to prove the substance of the words laid, but the sense and the manner of speaking them must be the same as averred.
2. It is no variance to prove more words than are laid, provided the context of the words proved, agree in sense with the words alleged.

ON WRIT OF ERROR to Circuit Court of Marion county.

WASH, J., delivered the opinion of the Court.

This was an action on the case for slander, commenced by Marlow *v.* Cooper in the Circuit Court, in which Marlow had verdict and judgment, to reverse which Cooper has come with his writ of error into this Court.

The declaration contains three counts.

(189) The first charges the words as spoken to the plaintiff.

The second and third charges them as spoken of the plaintiff.

The words charged are in substance, "that the plaintiff is guilty of forgery," "That the defendant Cooper knew that plaintiff Marlow had committed forgery," "That the plaintiff Marlow is guilty of forgery;" and "that he, Cooper, had a great mind to put the law in force against him for committing the crime of forgery."

The defendant pleaded,

First. Not guilty; and

Second. Justification.

On the trial the plaintiff proved by one Frazier, "that in August about three years ago, between the Waconda and Cooper's house, the defendant told him, (the witness,) that he was fearful his (the witness') brother had entertained hard thoughts of him concerning a letter which Marlow (the plaintiff,) had written to him, and to which Marlow had attached his, Cooper's, name, concerning some steers."

That Marlow by attaching his, said Cooper's, name to said letter, had committed forgery, and "that he had a great mind to prosecute him for it."

The verdict of the jury was, "that the defendant, of his own wrong and without any such cause as in pleading he hath alledged, did speak and publish the words in the declaration mentioned, as the plaintiff by replying hath alledged, &c.," on which the Court gave judgment, that the plaintiff recover against the defendant his damages," &c. The defendant then moved for a new trial.

First. Because the verdict was against law and evidence.

Second. Because there was no evidence that the charge of forgery had been made by the defendant against the plaintiff.

Third. Because there was no evidence under the plea of not guilty, to prove that the defendant made against the plaintiff the charge of forgery: and

Fourth. Because the damages are excessive, the motion was overruled and the refusal of the Court to grant a new trial is now assigned for error.

Cooper v. Marlow.

(190) Several questions have been raised on which the members of the Court differ in opinion, and which we will not now decide, inasmuch as this cause may be settled without passing upon them. The questions to be decided are:

First. Do the words proved vary from the words laid ? and

Second. Do the facts and circumstances attending the speaking of the words proved, forbid the idea of malice on the part of Cooper ?

On these questions, we think the law is clearly with the plaintiff in error. The cases of *Flower v. Pedley*, 2 *Esp. c.* 491; *Harrison v. Stratton*, 4 *Esp. c.* 218; *Wetters v. Man*, 2 *B. and A.*, 756; *Lady Ratcliffe v. Shubly* cro. *Eliz.*, 224, with some others that have been cited, have pushed the doctrine of variance to great lengths, and further in some instances perhaps, than this Court would be willing to go. They establish most satisfactorily the variance insisted on in this case. It is sufficient to prove the substance of the words laid; but the sense as well as the manner of speaking them must be the same as averred, and when actionable words are laid and proved, it will be no variance to prove more words than laid, provided the whole context of the words proved, considered together, agrees in sense with the words alledged. 2 *Starkie*, 846. This is as far as the authorities have gone on this point; and in the case under consideration, looking to the context of the words spoken, and the sense and manner of speaking them as proved, the charge in the declaration is not supported. From the plaintiff's own showing the words were spoken upon an occasion and under circumstances which afford a strong *prima facie* justification, and repel the charge of malice, of which the record exhibits no extrinsic proof. Upon the whole, therefore, we think the verdict was against law and evidence, and that the Circuit Court ought to have granted a new trial. The judgment is therefore reversed and the cause remanded.

Decisions of the Supreme Court of Missouri,

BOWLING GREEN DISTRICT, AUGUST TERM, 1833.

GRIFFITH, BY HIS NEXT FRIEND, AND GRIFFITH, WIFE OF GRIFFITH, v. WALEER, ADM'R OF WILLIAMS.

When a husband dies leaving children by a former wife, a latter wife cannot claim slaves absolutely, which came to the marriage by her. She is entitled to only one third part during her natural life.

ERROR to the Circuit Court of Callaway county.

M'GIRK, C. J., delivered the opinion of the Court.

It appears by the records that Eliza Williams intermarried with John Williams; that she had no children by him; that he died leaving children by a former wife; that after the payment of Williams' debts, there remained of his property, among other things, a negro man which came to Williams by his intermarriage with the said Eliza. She intermarried with Griffith, the plaintiff.

An application was made to the County Court of Callaway county for a decree against the administrator, to compel him to deliver the negro to Griffith and wife, as a legal part of her dower, without allowing the children of Williams, by his former wife, any part thereof.

The County Court made the decree required, from which an appeal was taken to the Circuit Court of the county. The Court reversed the decree, and ordered and decreed that the said Eliza was not entitled to have the slave absolutely, but that she was only entitled to one third part of the slave during her life.

The error assigned is, that the decree of the Circuit Court is erroneous.

It is insisted by the counsel for the plaintiff in error, that by the first section of the act of the General Assembly, *Revised Code*, 332, a widow is entitled to all the re-

Griffith v. Walker.

estate, slaves, &c., which came to the husband in right of the wife, when he dies, without children capable of inheriting from her.

On the other side it is insisted that the widow is only entitled to a third for life, of such real estate and slaves, the intestate leaving children capable of inheriting from him, notwithstanding he left no children capable of inheriting from the wife. The words of the act are, "that every widow, whether alien or not, of any person who shall hereafter die, shall be endowed in the lands, tenements and hereditaments, and other real estate lying in this State, whereof her husband was seized of an estate of inheritance in law or equity, during coverture, &c., and of all the personal estate and slaves belonging to her husband at the time of his death and which shall remain after the payment of his debts, in manner following, that is to say: if the husband shall leave no children or other descendants capable of inheriting, then the widow shall be endowed of all the real and personal estate which came to the husband in right of the wife by means of the marriage, absolutely, and of one full and equal half of all the real estate and slaves and other personal property of which the husband was possessed, (and which remains undisposed of,) in his own right absolutely: and if there be such children or their descendants, then the widow shall be endowed of one full and equal third part of such real estate and slaves during her natural life, and one equal third part of the personal estate absolutely."

When this cause was first argued, the Court had some difficulty in making an opinion; we however concluded that the words, "children capable of inheriting," should be read as if written, "children capable of inheriting from her;" but on re-argument we are well satisfied that opinion was wrong. The statute says, if the husband leaves no children capable of inheriting, then the wife shall be endowed of the one half of all the real estate and slaves which came to the marriage by the wife. The circumstance that the statute endows a widow of only half when there are no children, and that too of her own lands, when by the law the whole of her lands go to her, not as dower, but as her own property, created doubt and obscurity. All that can be said of this portion of the statute is, that this provision was inadvertently introduced and cannot have any effect to alter the wife's rights with regard to her real estate, after the coverture is dissolved; but with regard to the slaves and personal property, it may have effect to give her a different portion other than she would have had by the common law.

The question before the Court is this, can the widow claim the slave in question because it came to the marriage by her, when the husband left children capable of inheriting from him, though none were left capable of inheriting from her. The Court is now clearly satisfied that the widow cannot have the slave absolutely as part of her dower, but is only entitled to a third for life. The words, "children or other descendants capable of inheriting," are often and in many instances used in law, and they are generally so used to draw a line of distinction between those who are legitimate and those who are not so. In this case the words were used with that intent and none other. It is argued that this construction of the statute furnishes a bad rule of law for the widow. We admit it may often happen to be so; but if we adopt a contrary rule, equal if not greater hardships may arise. If the widow is entitled to take all her slaves and personal property back again, because she had no child by the husband, it must also follow for the same reason, that although he left twenty children by a former marriage, that the wife must have one half of the slaves and the other personal property absolutely, not for life, but forever. Could the Legislature intend this

Griffith *v.* Walker.

to be the rule of law? We think this would be as unjust, if not more so, than the widow's case is now said to be. We will suppose the law-maker saw the inconveniences on both sides of the question, and has preferred the rule we adopt, to the other.

The judgment of the Circuit Court is affirmed, with costs.

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Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, MAY TERM, 1833.

RALPH (A MAN OF COLOR) v. DUNCAN.

1. The master who permits his slave to go the State of Illinois to hire himself, commits as great an offence against the ordinance of 1787, as he who takes his slave along with him to reside there. (Note a.)
2. For the purpose of self government, the Constitution of Illinois might have been well in force from the time of its adoption, but in a suit for freedom the Court will limit its effect to the time when Congress assented to the admission of the State into the Union.
3. Evidence that the defendant gave his note to the plaintiff to prove that he acted with him as with a free man, is admissible.
4. The master's assent to the residence in Illinois may be inferred from circumstances.

APPEAL from St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Ralph sued for his freedom in the Circuit Court of St. Louis county, and judgment being given against him in that Court, he comes here to reverse that judgment.

On the trial of the cause it was testified by John Steele, that he had heard John Gordon, the former master of Ralph, say, in the year 1818 or 19, that he had been in the habit of hiring Ralph to work occasionally at the Ohio Saline from the year 1814 or 15, till the time of the conversation aforesaid. Witnesses were called to impeach Steele's character for veracity, others were called to support it; and William Gordon, a witness on the part of the defendant himself, by his testimony, seemed to support that of Steele. William Gordon was asked by the defendant if he did not live near his brother John Gordon in the years 1815-16-17-18 and 19, and if he knew that his

Ralph v. Duncan.

brother hired Ralph at the Saline in those years : to which question he answered, *that (195) he lived in five miles of John in those years*, he never knew of his (Ralph) being hired by John Gordon at the Saline. The witness, to make the matter more certain, was asked, whether if John Gordon had hired Ralph at the Saline, he did not believe he should have known it. The answer was, " I believe if John Gordon had hired him there I should have known it. I heard John Gordon say in his lifetime the negro hired his own time, and went to the Saline of its [his] own accord." The object of the ordinance of 1787, was to prohibit the introduction of slaves into the Territory of which the present State of Illinois constitutes a part, and the master who permits his slave to go there to hire himself, offends against that law as much as one who takes his slave along with himself to reside there, and if we are at liberty to regard the moral effect of the act, it is much worse to permit the slave to go there to hire himself to labor, than for the master to take him along with himself to reside there under his own inspection or to hire him out personally to some person who will be bound to pay the master the hire ; yet even this last act has been decided to be a violation of the provision of the ordinance. Abner Martin, one of the plaintiff's witnesses, also testified that he was the nephew of John Gordon, (former owner of Ralph,) that in 1831 he was 21 years old and that he recollects, when he was about seven years old, he had heard John Gordon say that Ralph was at work at the Ohio Saline. The witness stated that he had spent much time in Gordon's family, had no knowledge that Ralph was employed at the Saline, except from Gordon's statements. Much other testimony was given to prove a hiring of the plaintiff at the Saline and at the lead mines near Galena in Illinois, some part of which time was since the defendant became the owner ; but his assent was not expressly proved.

This testimony and some other not very material to be noticed, being given, the counsel for the defendant moved the Court to give six instructions, the sum and purport of which is as follows :

First. That the Constitution of Illinois takes date and was obligatory from the (196) time it passed unless some other date is provided in the instrument.

Second. That the execution of a note by the defendant to the plaintiff as given in evidence in this case does not operate a manumission of the plaintiff.

Third. That in order to entitle the plaintiff to recover in this suit, it must be proved that the defendant assented to his residence in Illinois.

These instructions were given.

The plaintiff prayed the Court to instruct the jury that the Constitution of Illinois took effect on 3d December, 1818, when Congress assented to the admission of that State into the Union, and not before that time. This was refused. The plaintiff then prayed a new trial, which was refused. This Court is of opinion that the instruction asked by the plaintiff should have been given, and that the first instruction asked by the defendant should have been refused.

We have no doubt that for the purposes of self government, the Constitution of Illinois might have been well in force from the time of its adoption : but for the purpose of the present cause, we incline to limit its effect to the time when Congress assented to the admission of the State into the Union.

It cannot be said that the second and third instructions asked by the defendant were improperly given ; but the evidence that the defendant gave his note to the plaintiff is certainly admissible to prove that the defendant treated with him as with a free man. Nor is it necessary to prove that the assent either of Gordon the former claim-

Fox v. Carlisle & Mason.

ant, or of Duncan, the defendant, was expressly given to the residence in Illinois, by virtue of which the plaintiff claims his freedom. This assent may be inferred from circumstances. The motion for a new trial was, in the opinion of this Court, improperly overruled. Then for the reason that the first instruction asked by the defendant was, in the opinion of this Court, improperly given, and that asked by the plaintiff improperly refused, and because the plaintiff's motion for a new trial was, (197) in the opinion of this Court, improperly overruled, (there being, as we think, evidence enough to entitle the plaintiff to a verdict,) the judgment of the Circuit Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

(a.) See *Wilson v. Melvin*, 4 Mo. R., p. 595.

Fox v. CARLISLE & MASON.

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A notice to take depositions on the 22d of the month will not authorize the taking of them by adjournment from day to day, on the 26th, without having commenced the taking on the 22d.

ERROR from the St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

The defendants in error, who were the payees of a certain bill of exchange, sued Fox the maker in the Circuit Court and had judgment: to reverse which Fox has come into this Court. Several questions have been raised which need not be now decided. The only one we shall consider arises out of the decision of the Circuit Court on the motion of the defendant below to exclude the depositions offered by the plaintiffs. The depositions were taken under the following notice: St. Louis Circuit Court. George Carlisle and John W. Mason v. Abraham Fox. Take notice, that on the 22d day of November next, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of that day, at the Planters' Hotel in the city of New Orleans, and State of Louisiana, I shall take depositions to be read on the trial of the above entitled cause on behalf of the plaintiffs, and that if they are not finished on that day, the taking of them will be continued from day to day between the same hours till they are completed, &c. The Judge before whom the depositions were taken certifies that he attended at the Planters' Hotel on the 22d of November, 1831, between the hours of nine o'clock A. M. and five o'clock P. M., agreeably to the (198) notice and adjourned from day to day between the same hours until the 26th

Fox v. Carlisle and Mason.

of the same month, on account of the witnesses not being able to attend from sickness, &c. The depositions were filed and opened in the Clerk's office on the 15th of March, 1832, and a memorandum thereof made on the docket according to the rule of said Court, which had governed the practice thereof from the time of commencing the suit to the time of trial, and is in the words and figures following: "71st. All depositions shall be opened and filed by the Clerk without delay, and a memorandum of the filing of depositions shall be entered in the docket opposite the cause; but no depositions shall be read on the trial of the cause unless it be shown to the satisfaction of the Court that the deponent is absent or unable to attend as provided by law, so as to render his personal attendance unnecessary; and no other objection to the reading a deposition in the cause in which it was taken, if opened, filed and noted on the docket one day before the trial, (except to the competency or relevancy thereof,) shall be allowed unless the exception be filed in writing before the trial, and within ten days after it shall be so opened and filed, and not thereafter, and all such exceptions shall be determined before a jury is sworn or the cause submitted." Exceptions were taken to the depositions on the 11th of April, 1832, and the trial of the cause was on the 9th day of May thereafter. It has been strongly urged by the counsel for the plaintiff in error, that this rule of Court is in violation of the statute law of the land, and therefore not obligatory. From the view we have taken, it becomes unnecessary to examine this position, since the objection taken to the depositions is without the rule of Court.

We are clear that the notice to take depositions on the 22d of the month, did not authorize the taking of them by adjournment from day to day on the 26th of the month, without having commenced the taking on the 22d, otherwise it would be almost impossible in the nature of things for parties interested in the cross examination to know when or before whom to attend. The depositions might as well have been (199) taken four months as four days after the time appointed. The dedimus and notice did not warrant the proceeding, and the depositions were incompetent to be read in evidence on the trial.

The judgment of the Circuit Court is therefore erroneous, and must be reversed with costs, and the cause remanded for proceedings conformably to this opinion.

MULLANPHY v. BURGESS.

Quere as to the liability of the property of a firm to attachment, at the suit of a creditor of one of the firm.

ON ERROR from the St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

Burgess sued one Cotter by attachment in the St. Louis Circuit Court, and obtained judgment on a promissory note. Mullanphy, the plaintiff in error, was garnishee, and answered the interrogatories submitted. A traverse of the garnishee's answer was filed, and on trial there was a verdict and judgment against Mullanphy for the amount of the debt recovered by Burgess against Cotter, to reverse which judgment Mullanphy now prosecutes his writ of error in this Court. The interrogatories required Mullanphy in substance to state whether, on the 17th of September, 1830, or at any time between the service of the attachment and the date of the interrogatories, or at the time of service or time of answering, he was indebted to Cotter, or had goods, chattels, moneys, credits or effects in his hands belonging to Cotter, &c., and whether the note (on which judgment was recovered by Burgess against Cotter) had ever been presented to him, Mullanphy, for payment; and when so presented, he had not admitted that he had funds and effects in his hands belonging to Cotter sufficient to satisfy the same, &c.? Mullanphy answered in substance that he did not know whether he was indebted to Cotter or not, but thought that he was not; (200) that when the attachment was served on him, said Cotter and one Molloy had a number of hands at work on certain buildings which said Cotter and Molloy had contracted jointly to put up for him; that the hands threatened to pull down the buildings unless he would pay them, and that he did pay them; that Cotter and Molloy soon afterwards absconded, leaving said buildings unfinished and exposed, and that he had to hire other persons to finish them; and believes that Cotter and Molloy were overpaid several hundred dollars; that he had never been otherwise indebted to Cotter, and never had any goods, chattels, moneys, credits or effects of his, in his (Mullanphy's) hands; that by his contract with Cotter and Molloy, he was to pay a reasonable proportion of wages as the work advanced, not exceeding the one-half, and was authorized to retain a sufficiency to indemnify him in case the work should be deserted or not properly executed; that he did not remember whether Cotter's note to Burgess had ever been presented to him, and that he had never promised to pay the same, or admitted that he had funds in his hands belonging to Cotter sufficient to pay the same, or any part thereof, except on the condition that the work should be finished according to contract, &c.; that he said to Burgess several times, that if Cotter went on with the work, he (Mullanphy) would have funds in his hands, but not otherwise, and repeatedly told him that he, Burgess, stood a bad chance of getting his debt; that he always had reference to Cotter's completing the work when he spoke of having funds in his hands; that Cotter and Molloy abandoned the work and absconded, being several hundred dollars in his debt, &c. There

Mullanphy v. Burgess.

was a general traverse of the answer, and on the trial it was proved in substance that after Cotter and Molloy abandoned the work and absconded, Mullanphy told a witness "that he would pay Burgess' claim; that he had reserved six or seven hundred dollars, out of which he would have to pay a debt of one Finney, on which an attachment had been brought, and Burgess' claim. This he (Mullanphy) said in reply to witness, Finney, who had called on him to pay a claim he (Finney) had (201) against Cotter; that if they went on and completed the work, there would be enough in his hands to pay them all." And to another witness, who had a demand against Cotter and Molloy, and who applied to Mullanphy before Cotter absconded, he stated "that if they went on with and completed the work, there would be enough in his hands to pay said (witness') demand; that there were some other demands to be paid first, and among them the demand of said Burgess was mentioned, and that he (witness) had but a slim chance of getting his debt." On the part of Mullanphy it was proved that after (Finney) the first named witness, had the conversation with Mullanphy, and had quit working on the buildings, other persons had to be employed by Mullanphy to complete the work; that the foundation wall of a part of said building was taken out, and a new one substituted, on account of the badness of the work, and witness stated it was the worst work he ever saw, and he wondered that the buildings stood. Upon this state of facts the jury found that said Mullanphy, at the time of the service of said attachment, and from and since that date, was and is indebted unto the said James Cotter in divers large sums of money, and has had in his care, charge and custody, divers goods, chattels, money, credits and effects belonging to him, the said Cotter, sufficient to pay and discharge said due bill; and that he, the said Mullanphy, acknowledged the same and promised to pay Burgess out of the money, credits and effects in his hands, belonging to said Cotter, the amount of said debt due from Cotter to Burgess. Mullanphy moved for a new trial, because:

First. The jury found against law and the instructions of the Court.

Second. That the jury found against the testimony.

Third. That the jury found without testimony; which motion for a new trial was overruled and excepted to.

Being clear that the evidence did not warrant the finding of the jury, and that a new trial ought to have been granted, we will now attempt to settle the other questions that have been raised.

(202) How far the property of a firm may be liable to attachment, at the suit of a creditor of one of the firm, is a question of great interest, and may be hereafter re-argued more fully. There is nothing in the evidence to warrant the verdict of the jury. The promise of Mullanphy to pay is, at most, but presumptive evidence that he owed that amount to Cotter at the time, and that presumption is fully met and repelled by the *positive statement* of the garnishee, whose answer discloses fully the whole transaction, and taken altogether shows clearly that the promise to pay the amount due from Cotter to Burgess, was predicated on a misconception of the true state of the building and of his accounts with the builders. The Circuit Court erred therefore in refusing to grant a new trial, and its judgment is reversed with costs, and the cause remanded to be proceeded in conformably to this opinion.

COLLINS v. WARBURTON & RISLEY.

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1. Due diligence is a question of law to be decided by the Court, and depends upon the circumstances of each particular case. (Note a.)
2. In a suit against an endorsee of a promissory note, the declaration must state the diligence made use of to recover the money from the maker of the note, that the Court may judge whether *due diligence* was used.

ON ERROR to St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of assumpsit instituted in the Circuit Court by Warburton & Risley, the defendants in error, against Collins, the plaintiff in error, as endorser and payee of a promissory note. W. & R. had judgment in the Circuit Court, to reverse which Collins now prosecutes his writ of error in this Court. There is a general assignment of errors. The declaration sets forth the note, which was dated July the 11th, 1829, signed by one Ira Kellogg, and payable four months after date, at the (203) office of discount and deposite of the United States Branch Bank at St. Louis. It alleges a presentment of the note on the day it became due, at the Bank for payment; the dishonor of the note and notice thereof to Collins in due form of law. The declaration then alleges that on the 13th of July, 1830, the plaintiffs commenced suit against Kellogg, the maker, in the Morgan Circuit Court, in the State of Illinois, upon said note, and that a writ of summons was, on the 14th day of the same month, issued from the Clerk's office of said Court, and was served on the said Kellogg; and that such proceedings were thereafter had in that suit, that on the 10th of September in the same year, judgment was rendered by said Morgan Circuit Court against said Kellogg, &c.; upon which judgment, on the 5th of October, in the same year, an execution of *fi. fa.* was issued, &c., on which the Sheriff returned *nulla bona*, &c. The defendant demurred generally to the declaration. The demurrer was overruled, and judgment given for the plaintiffs.

The only question presented for the consideration of this Court, arises out of the provisions of the second section of "an act concerning assigned bonds, bills and promissory notes," *Rev. Code*, p. 143. This section provides "that no assignor of any bond, bill or promissory note for the payment of money or property, shall hereafter be liable to the action of the assignee of any such bond, bill or promissory note, unless such assignee shall have used *due diligence* by the institution and prosecution of a suit at law against the maker, &c." It is insisted on by Mr. Spalding for the defendants in error, that the statements in the declaration are sufficient to show that the plaintiffs below "*used due diligence*," &c.

Due diligence is a question of law to be decided by the Court. It is like due notice of non-acceptance and non-payment, a *question of law*, depending upon the facts and circumstances of each particular case. The declaration taken to be true, must make out a case of legal notice. It is true that the precise day need not be stated; but if any other day be stated, than that on which the acceptance or payment was

Collins v. Warburton & Risley.

(204) refused, the excuse must also be stated that the Court may see if it be legal, taking it to be true, as stated. In this case, the declaration shows a suit instituted eight months after the note became due, and in a different State from that in which the note was given. The statement may be all true, and yet the plaintiffs below, instead of using "due diligence by the institution and prosecution" of the suit, may have been very remiss. For aught appears, several terms of the Morgan Circuit Court may have elapsed after the note became due and before suit was commenced, or the defendant in that suit may have continued to reside in the county of St. Louis, or elsewhere, to the knowledge of the plaintiffs, in possession of property out of which the execution might have been satisfied.

The diligence made use of must in like manner, as in the case of a notice, be stated that the Court may judge whether it be legal, or in the language of the statute, *due diligence*. In this case, we think the declaration defective in not averring that the suit was instituted at the first term of the Court after the note became due and payable, or showing some excuse therefor; and in not averring that the *fa. fa.* was the final and only available execution of the judgment to which the plaintiffs were entitled by the laws of Illinois.

The judgment of the Circuit Court is therefore reversed, and the cause remanded for further proceedings conformably to this opinion.

TOMPKINS, J., dissenting.

I do not concur in this opinion, believing the declaration well enough, and that on the plea of non-assumpsit, the plaintiff would have been compelled by the rules of pleading to make out a case of due diligence.

(a.) See Pococke *v.* Blount, 6 Mo. R., p. 338.

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Decisions of the Supreme Court of Missouri.

FAYETTE DISTRICT, SEPTEMBER TERM, 1833.

WASH v. R. & J. FOSTER.

The declaration alledged that the plaintiff recovered his debt, \$1,000, and his damages, \$32 19, and his costs, and averred that his costs amounted to \$13 90 and concluded with a *prout patet per recordum*. The plea was *nul tiel record*. A record was offered in evidence showing the amount of the debt and damages, without showing the amount of the costs. Below the certificate of the Clerk and the seal of the Court, was a taxation of costs amounting to the sum averred in the declaration. The record was rejected on the ground of variance. The same record, when offered in evidence for the recovery of the debt and damages, without costs, was also rejected.

ERROR to the Circuit Court of Boone county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of debt brought by Wash against Foster on two judgments recovered against their testator. There is a count on each judgment. Both are alike, and both judgments are alike. We will therefore consider the two as only one. The declaration alledges that the plaintiff recovered his debt of \$1,000, damages \$32 19, and his costs.

The judgment does not show how much the costs are. The declaration then avers the costs amounted to a large sum of money, to wit, to the sum of \$13 90, which costs were adjudged to him. The declaration then concludes with a *prout patet per recordum*. The plea is *nul tiel record*. On the trial the plaintiff offered in evidence a record showing the amount of the debt and damages, and the costs, without showing the amount of the costs. Then came the certificate of the Clerk and the seal of (206) the Court, and beyond and below the seal came a taxation of costs, amounting

Wash v. R. & J. Foster.

to the sum averred in the declaration. The record was rejected on the ground of variance. This rejection is assigned for error. The plaintiff then offered the record in evidence for the recovery of the debt and damages without the costs. This was refused. This is also assigned for error. There is no doubt with us, that the Court did right in both cases.

It is argued by Messrs. Wilson and Clark for the plaintiff, that the Clerk, by law, is the proper officer to tax the costs, and that the Circuit Court would be bound to know the act of the Clerk, (though he were Clerk for another county as is the case here,) as well as if the act done, had been done by the Clerk where the trial was had. We think a complete answer was given to this by Messrs. Leonard and Wells, the defendant's counsel, which answer is, that the declaration avers the costs amounted to \$13 90, and that the record produced for the proof of this does not prove what is the amount of the costs. We think there is a variance. If this taxation of costs had been above the seal, or had preceded it, then it would be what the law calls *sub pede sigilli* and would have been right.

The second question is, ought the Court to have received the record in evidence, as to the debt and damages? It is argued by counsel that the averment of the amount of costs being laid under a videlicet, may be regarded as surplusage and may be stricken out, and yet a complete cause of action will remain as to the debt and damages. We think that rule does not apply in this case. The plaintiff might have declared for the debt and damages alone, and might have abandoned his costs; but he has not done so. He has vouched the record for the amount of the costs, and must produce a record coming up to his description. The rule is not so strict when the instrument is not vouched by *prout patet per recordum*, but is used as new evidence. In that case considerable variances would not be deemed material. See ³ Starkie, 1603.

The judgment of the Circuit Court is affirmed with costs.

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BURK v. BAXTER.

1. Stills set up in furnaces in the usual manner for making whisky, are not fixtures, but personal property.
2. The act of levying and selling stills, without taking actual possession, will amount to a conversion on the part of a Constable.

APPEAL from the Circuit Court of Clay county.**TOMPKINS, J.,** delivered the opinion of the Court.

Burk sued Baxter in the Circuit Court of Clay county, and judgment being there given against him, he brought the cause by appeal into this Court.

The form of action is trover. The record shows that Baxter, the defendant in the Circuit Court and appellee here, in character of Constable, sold some stills which were in the possession of the plaintiff by virtue of an execution directed against another person than the plaintiff in this cause. The stills were set up in the usual way, and it was not proved that Baxter either pulled them down or assisted in doing it: the act of levying and selling was the only evidence of conversion. After the evidence was submitted to the jury, the plaintiff prayed the Court to instruct them, that if they found that Baxter, acting as Constable, sold the stills, such sale amounts to a conversion, and that they must find for the plaintiff.

Second. That to constitute a conversion of said stills, by the defendant levying and selling the same as Constable, it was not necessary that he should lay hands thereon, or take them into actual possession; but that it is sufficient that he should apprise the party in possession that he did seize and sell them in that character.

Third. That the stills are personal property and not fixtures to the freehold.

The jury having found a verdict for the defendant, the plaintiff moved for a new trial, because, as he alledged, the Court had misinstructed the jury. The refusal of the instructions prayed, and of the new trial, are assigned for error.

The points to be decided are,

(208) First. Whether the stills in the situation mentioned are personal property.

Second. Whether they being determined to be such, the act of levying and selling amounts to a conversion.

First. The case of Hunt v. Mullanphy, 1st vol. of Missouri decisions is in point.

The evidence in that case was brought up in the form of a special verdict. The property contended for was a copper kettle built into a furnace erected for that purpose so as to hide the kettle, except the edge or mouth of the same.

The furnace was connected with the chimney of a house by a flue, so as to take the smoke from the furnace into the chimney, through an opening made for that purpose; and the kettle and furnace might have been removed without any other injury to the chimney than laying bare the opening made in it to admit the smoke from the furnace. It was decided that the copper kettle, being in itself personal property, was not so attached to the freehold as to become a fixture. The stills are in themselves personal property, and can only be used by putting them up in furnaces in the

Ingram v. Matthien.

way it is testified these in question were put up: and we are well satisfied that the act of putting them up in the usual way to make whisky, does not change their character of personal property. No more need be said, as the subject of fixtures is fully illustrated in the case referred to.

On the second point we have no doubt. The defendant took as full possession of the stills, as from the nature of the property he could do, and exercised rights of ownership over them by selling them as the property of the person against whom his execution was directed. The Circuit Court, then, we think, erred in refusing the instructions prayed for, and in refusing a new trial. Its judgment is, therefore, reversed, and this cause remanded for further trial in conformity with this opinion.

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INGRAM v. MATTHIEN.

A. sold to B. goods to the value of \$1070, for which B. promised to execute his note with security to A. A. applied to B. to execute his note according to contract. B. refused. The goods, by order of A., were then conveyed about thirty miles and sold at auction for \$800. The hire of a clerk, fees of persons employed in selling and other expenses were proved. It was held that A. was not bound to give B. notice of his intention to sell—that having undertaken to sell, he was bound to discharge that duty faithfully, and to account for the proceeds of the sale—that he was entitled to compensation for all reasonable expenses, out of the proceeds of the sale—that he was entitled to recover from B. the difference between the price which B. agreed to pay for the goods, and the nett amount for which they sold—that the expense of transporting could not be recovered without proof that the goodness of the market warranted the transportation—and that if the removal of the goods had caused a loss, B. would have been entitled to an allowance for the amount of that loss.

ERROR to the Circuit Court of Boone county.

TOMPKINS, J., delivered the opinion of the Court.

Ingram commenced his action against Matthien in the Circuit Court of Boone county, and there had judgment for five dollars, and not being content, sued out his writ of error to reverse the judgment of that Court. On the trial of the cause it was proved that Ingram had sold to Matthien a lot of goods for one thousand and seventy dollars, and that on the 28th day of May, 1831, Matthien agreed to execute his note with security to Ingram for that sum of money, and that he failed to do so. The

Ingram v. Matthien.

plaintiff then applied to him to execute his note according to contract, and he refused to do it.

The goods were then conveyed by wagons from Fayette in Howard county, where they had been sold, to Huntsville in Randolph county, a distance of about twenty-five miles. There they were sold at auction by order of Ingram, under whose direction they had been conveyed to that place. They were sold for eight hundred dollars. The hire of a clerk it was proved amounted to twenty-one dollars, and evidence was given of other expenses as of transportation, and fees of persons necessarily employed in selling goods by auction. The plaintiff then by his counsel prayed (210) the Court to give many instructions, which were refused. The sum of the instructions prayed is, that "if the jury find Matthien agreed to purchase the goods for any given price, and failed to comply with his contract in executing his note therefor, and in receiving the goods, then the plaintiff might lawfully sell the goods: and if the plaintiff did use due diligence in selling them, and did in good faith sell them for a price less than Matthien the defendant had agreed to give, in such case the defendant ought to pay to the plaintiff the difference between the price agreed on between them, and the amount of the sales of the goods after deducting all reasonable expenses."

Both plaintiff and defendant to support their case, cite the case of *Sands & Crump v. Taylor & Lovett*, 5 John. Rep. 395. On the side of defendant in error, it is contended that the plaintiff in error had no right to demand the difference between the amount of sales and the price agreed on, unless he had given notice of his intention to sell and had sold at Fayette where the contract was made. On the other side it was contended that notice was not material, and the removal of the goods to Huntsville was immaterial, provided they were not therefore sold at a less price. In the case above cited from 5 *Johnson*, there had been a delivering of a part, and the Court say, "after the defendants' refusal to accept the residue of the cargo, it was thrown on the plaintiffs' hands, and they were by necessity made trustees to manage it: and being thus constituted trustees or agents for the defendants, they must either abandon the property to destruction by refusing to have any concern with it, or take a course more for the advantage of the defendants by selling it." There is a strong analogy between this case and that of the assured, in case of an abandonment, after a loss has happened within the policy, and the assurer refuses to accept the abandonment. In both cases the party in possession is to be considered an agent for the other party from necessity, and his exercise of the right to sell, ought not to be considered a waiver of his rights on the contract. This rule operates justly as respects both parties, for the reasons which induced one party to refuse the acceptance of the property, will induce the other to act fairly, and sell it to the best advantage. It is a much fitter rule than to require it of the party on whom the possession is thrown against his will, and contrary to the duty of the other party to suffer the property to perish as a condition on which his right to damages is to depend." That Court then said that there were no decisions in the books, either establishing or denying the rule adopted in that case, but that it appeared to be founded on principles dictated by justice and good sense. In this opinion of that Court we readily concur, and like them we think that Ingram in the cause before us became the agent of Matthien by necessity, when Matthien refused to take the goods into his own possession, and that in order to acquire the right of an agent, it was not necessary for him to give Matthien notice of his intention to sell. Matthien could not have complained had Ingram

Bell & Craig v. Scott.

abandoned the goods, and thereby a total loss had accrued. But Ingram having undertaken to sell them, he was bound to discharge that duty faithfully, and to account for the proceeds of the sale: he also is justly entitled to be compensated out of the proceeds of such sale for all reasonable expenses: and then the difference between the price which Matthien agreed to pay for the goods, and the nett amount of the sales of the same, is what we think Ingram is entitled to recover from Matthien. It was contended, however, for the defendant, that Ingram by transporting the goods to Huntsville, forfeited all claim to recover the difference from Matthien. We do not think so. We are of opinion that Ingram ought not to recover the expense of transportation from Fayette to Huntsville, unless he can prove that the goods sold at Huntsville for a better price than they could have been sold at Fayette, and that the goodness of the market warranted the expense incurred in transportation. On the other hand we believe that if Ingram, by removing the goods to Huntsville, caused them to sell for less than they might have been sold at Fayette, Matthien is entitled to an allowance for the loss so sustained. We will further add that in our opinion (212) Ingram ought to be allowed as a part of the necessary expenses, the license of an auctioneer, provided it were necessary to have one licensed for the purpose of that sale.

The judgment of the Circuit Court is, therefore, reversed, and the cause remanded and a new trial awarded.

BELL & CRAIG v. SCOTT.

Where a fact is simply alledged, without vouching any instrument, and an instrument is used as mere evidence, a variance will not be material, if the substance is proved.

ERROR to the Circuit Court of Saline county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action against a Sheriff for a voluntary escape. The declaration sets out the judgment for debt, damages and costs, which costs were general without saying how much. The declaration then avers that these costs amounted to \$3 37 1-2; it then concludes with a *prout patet per recordum*. The declaration then avers that an execution issued for the debt, damages and costs aforesaid, which said debt, damages and costs were duly endorsed on the execution with the additional costs of said execution, amounting in all to the sum of \$5 00. The record containing a copy of the execution and endorsements, were offered in evidence and rejected by the Court

Dameron v. Belt.

on the ground of variance. On the back of the execution the costs are endorsed thus—costs, Clerk's fees \$1 87 1-2, tax on execution 62 1-2, attorney Wilson \$2 50 —\$5 00. It is assumed that the \$1 87 1-2 charged here as Clerk's fees are intended to be the Clerk's fees accrued before the issuing the execution, and that sum added to the \$2 50, the fee of the attorney, will make \$4 37 1-2. It, therefore, cannot be true: the costs of the suit on the rendition of the judgment were only \$3 37 1-2. Inasmuch as the Clerk has in this taxation made no charge for his issuing fee, we are (213) well satisfied that the Clerk's fee of \$1 00 for issuing the execution is included in his charge of \$1 87 1-2. Take this sum from his charge of Clerk's fees, the balance will be \$3 37 1-2; so that we conceive there is not even a technical variance. Another view in regard to this variance is this: that as this matter of variance only arises on the taxation of costs, endorsed on the execution, no advantage can be taken of it. The declaration does not vouch the record as proof of that matter by a *prout patet per recordum*. Then we conceive the variance is subject to the rule laid down in 3 Starkie's Evi. 1603, which rule is, that where a fact is simply alledged, without vouching any instrument, and the instrument is used as mere evidence, a variance will not be material, if the substance is proved. The same rule was laid down by this Court in Martin v. Miller.

The judgment of the Circuit Court is reversed, the cause is remanded, &c.

DAMERON v. BELT.

Where the defendant pleaded a tender to an action on a bond for one hundred dollars, to be discharged in horses on a certain day, it was held that the tender should have been made at the house of the obligee, unless he had repaired to the house of the obligor on the day the debt became due, in which case a tender at the house of the obligor would have been good.

APPEAL from the Circuit Court of Randolph county.

TOMPKINS, J., delivered the opinion of the Court.

Dameron sued Belt by summons and petition in the Circuit Court of Randolph county, and there obtained judgment, to reverse which, Belt appeals to this Court. From the record we learn that Dameron sued on a bond for one hundred dollars, to be discharged in horses on a given day. Belt pleaded three several pleas of tender to Dameron at the county of Randolph aforesaid; to all of which Dameron demurred.

The law governing such contracts, as settled in the Courts of Kentucky, is, that (214) the plaintiff, to convert the demand into a money debt, must make a demand

Dameron v. Belt.

at the dwelling house of the obligor, where alone it can be reasonably supposed that he contracted to deliver property, no place being determined on in the obligation; and if the obligee sue at common law, he must in his declaration set out a special demand. But this is a statutory action, and the plaintiff has pursued the form prescribed by the act of the General Assembly; and the defendant having thought fit to plead a tender, it seems but just if he wished to avail himself of a tender, that it should have been made at the dwelling house of the plaintiff. For as the law supposes that the obligor ought not to be required to pay cumbrous and unwieldy property (no place being fixed in the contract) at any other place than at his dwelling house; so if he find it more convenient to make a tender than to wait for a demand, ought he to make that tender at the dwelling house of the obligee, where alone we can reasonably suppose him prepared to receive; unless indeed he might have repaired to the house of the obligor, on the day the debt became due; in such case no doubt it would be decided that a tender would be good if made at the dwelling house of the obligor. In this case, the obligor having pleaded that he tendered the horses in Randolph county generally, we think the Circuit Court rightly sustained the demurrer to his pleas.

The judgment of the Circuit Court is therefore affirmed.

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MCLEAN, ADM'R OF BROCKMAN, v. THORP.

1. Where the witness was asked whether or not the defendant admitted in conversation, that the plaintiff had not received his portion of an estate, it was held that the interrogatory was leading in its character, and should have been suppressed by the Court.
2. A. commenced an action of assumpsit against B. B. pleaded the statute of limitations. The Court instructed the jury to find for the defendant, unless they believed from the evidence before them that the defendant did promise to pay within the five years next preceding the commencement of the suit. This instruction was held to have been properly given.
3. Where it was in evidence that the defendant had said within the five years next preceding the commencement of the suit, that he must have some money or the plaintiff would sue him, and also that the defendant was agent for the plaintiff in selling some property, the Court were not agreed to say that the jury should have been instructed, that there was no evidence before them of a promise of payment made by the defendant to the plaintiff within the five years next before the commencement of the suit; but they held that a motion of the defendant for a new trial should have been granted. (Note a.)

APPEAL from Randolph Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Thorp brought his action of assumpsit against Brockman, in the Circuit Court of Randolph county. Brockman pleaded non-assumpsit, and the statute of limitations. Thorp had judgment in the Circuit Court, and to reverse that judgment this appeal is taken. On the trial of the cause, it was in evidence that Joseph Embree, now deceased, made a gift by deed, dated 15th July, 1818, of some personal property to eight of his children and three of his grand children, of which personal property the three grand children were to receive one-ninth part, to be equally divided among them. Brockman, the defendant in this cause, was by Thorp, who had married one of the grand children of said Joseph Embree, constituted his agent to sell and receive pay for his wife's interest in property accruing under the said deed. The others taking under the said deed also constituted him their agent. In the year 1818, Brockman sold the property on a credit, and took notes from the purchasers. All (216) the testimony given to prove the acknowledgment of the demand of Thorp within five years next before the commencement of this suit, is contained in the testimony of two witnesses, David Hampton and Joseph Embree. Hampton says that in the latter part of the year 1829, or the first of 1830, Stephen Brockman informed him he must have some money or Thorp would sue him. To Joseph Embree, the other witness, the question was put: "If you had a conversation with Stephen Brockman, the defendant, state when it was, and whether or not he admitted in that conversation that the plaintiff, Thorp, had not received his portion of the estate of Joseph Embree, deceased." Answer: "The conversation referred to in the question, was in the winter of 1829 or the spring of 1830. Said Brockman stated to me that he thought there were about four or five hundred dollars coming to him from

McLean v. Thorp.

David Hampton, and the said Thorp had not received his part of the estate, as I understood him." It was also in evidence that Joseph Embree, deceased, after making the deed aforesaid, died, and that Hampton administered on the estate; that Hampton and Brockman, by authority of the heirs of Embree, sold the land of deceased; and that Hampton paid Thorp his interest in the sales of the land; and that Hampton said he always intended paying Thorp his proportion of the sales made by him as administrator of Joseph Embree, and his proportion of the sale of land alluded to before in his deposition. On the trial of the cause the defendant moved the Court to suppress the interrogatory above mentioned, (for the deposition of the witness had been taken,) and the Court overruled the motion. The defendant, after the testimony was closed, moved the Court to instruct the jury, that there was no evidence before them of a promise of payment, made by the defendant to the plaintiff, at any time within five years next before the commencement of this suit. This instruction the Court refused, but instructed the jury to find for the defendant, unless they believed from the evidence before them that the defendant did make such promise within five years next before the commencement of this suit. After verdict the defendant moved the Court to grant a new trial for these reasons :

(217) First. The verdict is against the law and evidence.

Second. The Court misinstructed the jury.

Third. The Court refused to give the instruction above prayed for.

Other reasons were assigned which we do not think it material to notice.

It is assigned for error :

First. That the Court permitted incompetent evidence to go to the jury.

Second. That the Court refused to instruct the jury that there was no evidence before them of a promise made by the defendant to the plaintiff, for the payment of money at any time within five years next before the commencement of this suit.

Third. The Court erred in refusing a new trial.

The first error assigned embraces the overruling by the Court of the defendant's motion to suppress the answer of Joseph Embree to the interrogatory above mentioned. Had that question been put in this form, "did not Stephen Brockman admit in that conversation, that Thorp had not received his portion of the estate of Joseph Embree, deceased," its leading character would not have been disputed by any one. It has been sometimes attempted to qualify that kind of questions by putting them thus : "Did Brockman or did he not admit," &c. But the practice has always been discountenanced by the Courts, because although the question is put in the alternative, yet the witness, supposed in law to be partial to the suitor summoning him, will always have sagacity enough to know whether an answer in the negative or affirmative will most conduce to advance the interest of his friend, and is by such a question as directly led to the answer wanted, as if the question had been put thus : "Did he not admit that Thorp had not received," &c. In the case before the Court the witness was asked whether or not Brockman admitted that Thorp had not received his proportion of the estate of Joseph Embree, deceased. This last manner of stating the question is equally as objectionable as the former. The Court erred then, we think, in not suppressing the answer.

(218) The second assignment, viz: that the Court misinstructed the jury, is not in our opinion well made. Whether the Court erred in refusing the instructions prayed, will be inquired into in another place; but certainly the instruction given was correct.

McLean v. Thorp.

The third assignment of errors, viz : that the Court refused a new trial, we think was correctly made. For the answer of Joseph Embree being suppressed, as it ought to have been, no testimony remains against Brockman, but the declaration made by him to Hampton, viz : that Brockman informed him in the latter part of the year 1829, he must have some money or Thorp would sue him. This testimony, weak as it is, being before the jury, with the evidence before given of Brockman's agency in selling the property conveyed by the deceased, Joseph Embree, to his children, and also the evidence of his authority to collect the proceeds of such sale, the Court are not agreed to say that the Circuit Court erred in refusing the instruction asked by the defendant ; but they feel no hesitation in saying that even had the answer of Joseph Embree been competent evidence, a new trial ought to have been granted. That answer is very vague : "Brockman stated to me that he thought there were about four or five hundred dollars coming to him from Hampton, and that Thorp had not received his part of the estate." Of what estate? No estate but that of Joseph Embree, deceased, had been spoken of, and Hampton administered—then the share of Thorp was coming from Hampton. For the property given by the deed of the deceased could not be called his estate. It had changed owners in his lifetime. Again let us examine the preceding clause of that answer : "Said Brockman told me that there were about four or five hundred dollars coming to him from Hampton." It might well be that Brockman intended to say this money was coming from Hompton to himself, and indeed the latter clause of the answer, which was above noticed, seems to be unmeaning, unless we suppose the money were coming to some other person than Thorp : for he then says, "and the said Thorp had not received his part of the estate." Now if there were four or five hundred dollars (219) coming to Thorp from Hampton, Brockman could not be the debtor ; and moreover it would have been idle to add, after saying so much, that Thorp had not received his proportion of the estate. Again it may be asked of what estate had he not received his share? No estate but that of Joseph Embree had been spoken of, and Hampton was the administrator : then Brockman could not be liable for that sum. Nor can it be pretended that the property conveyed by the deceased in his lifetime, to his children and grand children, could be called his estate after his death. For these reasons the judgment of the Circuit Court is reversed, and the cause remanded for further trial.

(a.) See same case,	4 Mo. R., 256.
Bucher v. Johnson's adm'r,	4 " " 100.
Elliott v. Leake,	5 " " 208.
Davis v. Herring,	6 " " 21.

VEST v. GREEN.

1. A. with B. as security, executed his note to C. for \$100. A. to indemnify B., assigned to him several notes on solvent men to the value of \$150. B. sold the notes so assigned, to C., in discharge and satisfaction of the note on himself and A. When A. assigned the notes to B., C. had a judgment against them for \$91 31. In a suit by A. to recover the difference in the value of the notes assigned to B. and the note given to C., it was held that the Court did right to refuse to instruct the jury, that if they believed the notes in the declaration mentioned, were assigned to B. as a pledge to secure him against the note to C., and that he gave up to C. all the notes so assigned in satisfaction of that note, and if they believed also that the notes so assigned were, at the time they were given up to C., worth more than C.'s note, they must find for the plaintiff the amount of the difference of such value.
2. Where property is pledged to indemnify against a debt, when the debt falls due the pledge may lawfully apply the property in discharge of the debt.

ERROR to the Circuit Court of Randolph county.

M'GRINN, C. J., delivered the opinion of the Court.

This was an action on the case commenced before a Justice of the Peace by Vest against Green for a violation of a trust reposed in Green by Vest. Vest had judgment before the Justice of the Peace for fifty dollars. An appeal was taken to the (220) Circuit Court, where Green had judgment, and Vest has brought the case here by a writ of error. In the Circuit Court Vest suffered a non-suit, and prayed to have the non-suit set aside, which was refused. This is assigned for error. The questions to be considered arose on the trial which preceded the non-suit. It appears by the bill of exceptions that in the fall of the year 1830, Vest and Green came to the witness, R. Wilson, and stated to him that E. T. Hickman held a note on Vest and Green for about \$100, and that Green was only the security of Vest. That Green was apprehensive Vest would become insolvent, and that he would be compelled to pay the debt. That Vest to secure and indemnify Green against the note, unconditionally assigned to him one note on W. T. Curran to Vest for \$100, one note or bond made by one Rice to Vest for the sum of about \$12, one note made by one Smoot for \$8 50 to Vest, one other note made by one Noble to Vest for \$16, and other notes to the amount of about \$12: in all about \$150. That Green appeared willing to accept the note on Curran as a sufficient security; but Vest to make him entirely safe, assigned him the other notes; that witness understood from Green that previous to the commencement of this suit he had sold and gave up to Hickman all the notes so assigned to him in discharge and satisfaction of the note he and Vest were bound in to Hickman. It was also proved that all the notes were paid to Hickman. Another witness testified that Green told him that he, Green, had notes enough assigned to him by Vest to pay the Hickman note, and to pay the witness' demand of about \$40 against Vest. It was also proved that the obligors in said notes were solvent men, at the time the notes were made. It appears that at the date of the assignment of the notes, Hickman had a judgment against Vest and Green on his

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note for \$91 31. On this state of testimony the plaintiff, Vest, asked eleven instructions which were refused by the Court. The substance of many of these instructions is the same as of those decided against Vest when the cause was up before. Some, however, present new points. We will consider the first one asked by Vest, which is as follows :

(221) That if the jury believe the notes in the declaration mentioned were assigned to Green as a pledge to secure him against the Hickman note, and that he gave up to Hickman all the notes so assigned in satisfaction of that note, and if they believe also that the notes so assigned were, at the time they were given up to Hickman, worth more than the Hickman note, they must find for the plaintiff the amount of the difference of such value. The Circuit Court did right to refuse this instruction. Hickman had a judgment against Green and Vest at the time these notes were given up to him. It might be that his execution was out, and that Green's property might be sacrificed unless he immediately paid the debt, and that Hickman would take nothing less than all the notes in satisfaction of his debt. It might be that the obligors in those notes lived at great distances from Hickman, and it might be that the notes had a long time to run. If any of these things existed, (and we cannot say they did not,) then Hickman would not be likely to take less than the amount of the notes in satisfaction of his debt. The substance of many other instructions refused, is, that Green had no right to sell the notes to Hickman in satisfaction of his debt till he was indemnified. This position is not law.

Was Green bound to wait till his property was under execution, or till he paid the debt out of his own money, before he sold the notes? We think this would be requiring of him that which he was neither bound in law nor conscience to do. So if money is pledged as an indemnity against a debt, when the debt falls due the pledgee may lawfully apply the money pledged to pay the debt. When money is pledged to indemnify against an event, when the event happens the pledgee may use the money and relieve himself from the liability. Such also is the law, as we believe, when property is pledged as an indemnity.

The fourth instruction asked by Vest and refused, has no testimony to support it. We will therefore pass it by. We believe all the other instructions refused are either embraced in those decided on heretofore, or are answered by what is said above. The defendant, Green, then asked four instructions, which were given. (222) They were decided by this Court when the cause was up before.

The second instruction given on the former trial was by this Court deemed to be erroneous. That instruction, as altered by the party and given by the Court, is deemed to be correct. A point is made respecting the motion of Vest in the Circuit Court to dismiss the appeal. That point was also decided against Vest, when the cause was up before. The judgment of the Circuit Court is affirmed with costs.

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ADAMS v. HANNON.

1. Where the plaintiff sued as an infant by her next friend, for a charge of adultery, it was held that if she was an unmarried woman she was incapable of committing adultery, and that if she was married her husband should have joined her in the action. (Note a.)
2. The words charged in the declaration were, "I stroked her," without any inuendo as to the signification of the word "stroked." Held, that the declaration set out no cause of action : for whatever obscene meaning the word "stroked" may convey in particular sections of the country, or in particular companies, it is certain that as it is generally understood by the well educated part of society, it has no bad meaning.
3. It is not error to refuse to hear motions to strike out before the pleadings are opened to the jury.
4. The witness was asked what was the character of the plaintiff for chastity among the majority of her neighbors with whom he had conversed. It was held that this evidence was very properly rejected.

ERROR to the Circuit Court of Boone county.

TOMPKINS, J., delivered the opinion of the Court.

Rachel Hannon, by Esam Hannon, her next friend, (she being an infant under the age of twenty-one years,) brought her action in the Circuit Court of Boone county, against Robert Adams, for words spoken, and had judgment. To reverse this judgment, Adams by writ of error brings the cause into this Court. The declaration commences with an averment of the plaintiff's good character and innocence, and then the plaintiff avers that the defendant to cause it to be suspected and believed that she was guilty of adultery, and to subject her to the pains and penalties of adultery, spoke the words in the declaration charged ; on account of which speaking she avers she has been suspected, and believed to be guilty of the crime of adultery. There are three counts to the declaration : the words (223) charged to be spoken in each are the same, but spoken in different manners ; they are, I (meaning Robert Adams,) stroked her, (meaning Rachel Hannon). There is no averment that the word used to convey the idea of carnal knowledge, was by the hearers or by those of the neighborhood where it was used, understood to convey that idea. After the jury was empaneled, and before the pleadings were opened, the defendant moved the Court to strike out three counts of the declaration : the Court refused to take up the motion before the pleadings were read to the jury : after they were read, the defendant renewed his motion and it was overruled. After the plaintiff's testimony was closed, the defendant introduced a witness to prove the general character of the plaintiff for chastity, amongst a majority of her neighbors with whom he had conversed. This witness stated that he had never resided in the neighborhood, but that he was frequently at the house of an uncle who resided as near neighbor to the plaintiff before the commencement of this action, and had fre-

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quently remained there several days at a time, and heard several of the neighbors who were there, express their opinion about the plaintiff's character, some of a favorable and others of an unfavorable kind : these being all the facts the witness had stated, the defendant asked the witness what was the character of the plaintiff for chastity among a majority of her neighbors, with whom he had conversed on that subject. The Court on motion of the plaintiff refused to suffer the witness to answer the question. After verdict found for the plaintiff, the defendant moved the Court to set aside the verdict, and for a new trial.

First. Because the verdict was against law and evidence.

Second. The damages were excessive.

Third. Because the Court refused to admit the defendant's testimony.

This motion being overruled, the defendant moved in arrest of judgment,

First. Because the declaration is wholly defective.

Second. The words alledged gave no cause of action : this motion, too, was overruled.

(224) It is assigned for error,

First. That the Court erred in refusing to hear the motion to strike out when it was first made.

Second. The Court erred in refusing to strike out the counts when the motion was heard.

Third. The Court erred in rejecting the evidence of general character offered by the defendant.

Fourth. It erred in refusing a new trial.

Fifth. It erred in refusing to arrest the judgment.

The points to be decided are,

First. Was the declaration good ?

Second. Was the evidence rejected of such a character as ought to have gone to the jury ?

First. In this action the plaintiff sues as an infant by her next friend.

Adultery is the criminal conversation of a married person. If she be indeed a married woman, her husband ought to have joined in the action : and if she be not married, then she could have been in no danger of the "*disgrace, pains and penalties of adultery*," from the speaking of the words charged : for let them be ever so significant, they cannot carry the charge of adultery against a person incapable of committing the act. It ought to have appeared in the declaration, she was in a condition to commit adultery. We will however consider the language used to impute the act of adultery to the plaintiff. The efficient word is "*stroked*." Whatever obscure meaning this word may convey in particular sections of the country, or in particular companies, it is certain that as it is generally understood by the well educated part of the community, it has no bad meaning. If then from the manner in which it has been used by the defendant or in the particular neighborhood or company where it is used, it has acquired a signification calculated to convey the charge which is attempted to be set out in the declaration, that fact should have been averred. In 2 *Saund.* 242, note first, it is said that if the words spoken be Welsh, French, or other foreign language, the plaintiff must aver that the hearers understood such language, unless (225) indeed in respect to Welsh words the action is brought in any of the Courts of the great sessions in Wales, for it shall be intended the hearers understood the words : by analogy to that case we may suppose that if it were averred and can be proved

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that the words here charged to be spoken were in the neighborhood where they were spoken, understood in a sense calculated to convey the idea of carnal knowledge, then it would not be necessary to aver that they were understood by the hearers.

We are of opinion then that for the two reasons above mentioned, there is no good cause of action set out in the declaration. It may here be added that in the opinion of this Court, the most convenient practice would be to hear motions to strike out, before the pleadings are opened to the jury; but that it is not error to refuse to hear such motions before reading them.

Second. We are of opinion the evidence was very properly rejected by the Circuit Court.

What is the character of the plaintiff for chastity among the majority of her neighbors with whom the witness had conversed, is, we think, a question not at all calculated to elicit an answer proper to prove the general character.

On the first point then we are of opinion that the judgment ought to be reversed. It is therefore reversed and the cause remanded, and the plaintiff will have leave to amend his declaration.

(a.) See Dyer v. Morris, 4 Mo. R., p. 214.

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Where a defendant has been ruled to give security for costs, and has failed to do so, he cannot be allowed to do so after a motion by the defendant to dismiss the suit.

ERROR to the Circuit Court of Randolph county.

TOMPKINS, J., delivered the opinion of the Court.

(226) Snell sued Owens in the Circuit Court of Randolph county. In the progress of the cause, Owens moved the Court to rule Snell, for reasons filed, to give security for costs; and the Court ruled him accordingly to do so within thirty days before the then next succeeding term. On the first day of March, 1833, Owens again moved the Court to dismiss the cause, because a bond had not been filed agreeably to the order of the Court above mentioned. It appeared that a paper writing called a bond had been filed by the plaintiff, which was called a bond for costs. This writing was filed on the 25th day of February, next preceding the day of making the motion. The Court dismissed the cause and the plaintiff excepted to the opinion of the Court. On the next day, (viz.) 2d day of March, which was the second day of

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the term, the plaintiff moved the Court to reinstate the cause on the docket, and the Court overruled the motion. We find after the bill of exceptions, the copy of the bond; but as it is not incorporated with the record by the act of the Court, as it might have been by copying it into the bill of exceptions, we can take no notice of it: and indeed the Circuit Court may have refused to notice it because it was insufficient: for we are to presume its judgments are correct and well founded, until the contrary appears. We must therefore treat it as no bond. This Court has gone far to keep suitors in Court. In the case of *Brown v. Ravenscroft*, the judgment of the Circuit Court of Cape Girardeau county was reversed, because it dismissed the cause for the reason that Brown had not filed security for costs, agreeably to an order of that Court. But in that case Brown had offered to file sufficient bond, before the motion to dismiss was made. We cannot indulge suitors farther. In the case cited, as well as that now before the Court, the defendant would necessarily go to the Clerk's office on the day the plaintiff was ruled to give security for costs, to see whether it was necessary to make preparation for trial, and finding no bond, it would not be unreasonable that he expected in the event to get rid of a vexatious suit. But this Court interposes to keep the plaintiff in Court, merely because he files his bond (227) before a motion is made to dismiss. But in the cause before us, we are asked to go a step farther and allow a bond to be filed after the defendant has moved to dismiss. We cannot do this. The judgment of the Circuit Court, we think, is correct. It is therefore affirmed, and the defendant in error is allowed his costs.

BIRCH & HADEN v. ROGERS.

Where a suit was commenced by an assignee, Charles R. Rogers, and the note in evidence was assigned to C. R. Rogers, it was held that a motion to instruct the jury that there was no evidence to prove that C. R. Rogers to whom the note was assigned, was the plaintiff Charles R. Rogers, was properly refused.

ERROR to Howard Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Rogers sued Birch and Haden in the Circuit Court of Howard county, and there had judgment. To reverse this judgment, Birch and Haden prosecute their writ of error. Rogers commenced his suit in the Circuit Court by petition and summons, and states his case thus: "Charles R. Rogers, plaintiff, states that he holds a note on the defendants, James H. Birch and Joel H. Haden, in substance as follows: \$176 75—four months after date we or either of us promise to pay James Barnes one hun-

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dred and seventy-six dollars and seventy-five cents, &c." On which is the following assignment: "I assign the within note to C. R. Rogers for value received, September 1st, 1832, &c., whereby the plaintiff became the proprietor thereof, of which the defendants had due notice." The defendants put in a plea denying the assignment. On the trial of the cause the plaintiff proved that the signature to the assignment of the note sued on was the signature of James Barnes the assignor. No other evidence was given.

The defendants then moved the Court to instruct the jury, that there was no evidence before them to prove that C. R. Rogers, to whom the note was assigned, is the plaintiff Charles R. Rogers, and that therefore a verdict must be found for the defendants. The Circuit Court refused to give the instructions demanded. In stating his case the plaintiff has pursued the form prescribed by the act of Assembly, and pursuing that form, he has averred that by virtue of the assignment of Barnes, he became the proprietor of the note sued on. His evidence is an assignment to C. R. Rogers by Barnes, and his possession of the note. The identity of the person of the assignee is put in question by the plea. We think the Court was authorized to consider his possession of the note as some evidence in his favor. It was also just in our opinion, that the Court should take notice of the frequency of the practice of abbreviating the given names of men, and that the letter C being the initial of Charles, might well be intended for an abbreviation of Charles. With such evidence before it, we think the Circuit Court might well refuse the instructions asked for by the defendants. It may be added that had there been any doubt of the identity of C. R. Rogers and Charles R. Rogers, evidence might have been offered by the defendants to prove that Charles R. Rogers was not the assignee. We are then of opinion that the judgment of the Circuit Court ought to be affirmed, and the defendant in error is allowed his costs.

FENTON v. WILLIAMS.

In a suit by summons and petition, where the petition pursued the direction of the statute as to form, and the summons required the defendant to answer the plaintiff in a plea of debt, damages and costs, it was held that there was no variance between the petition and summons. (Note a.)

ERROR to the Circuit Court of Boone county.

M'GIRK, C. J., delivered the opinion of the Court.

The original proceeding in this case commenced by petition and summons to re-
(229) cover a certain debt. Fenton, the defendant in the Court below, demurred to

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the summons. The demurrer was overruled, and the plaintiff had judgment. The causes of demurrer are as follows:

First. The summons is variant from the petition as to the form of action.

Second. That the action is petition and summons, and the summons requires the defendant to answer the plaintiff in an action of debt, damages and costs.

Third. The summons is variant from the petition as to the nature of the action.

The form of the petition prescribed by the act of the General Assembly is as follows: A. B., plaintiff, states that he holds a bond or note on the defendant C. D., in substance as follows, (here insert a copy of the bond or note,) yet the said debt remains unpaid. Wherefore he prays judgment for his debt and damages for the detention of the same together with costs. The 3d section of the act says a summons shall be annexed to the petition, requiring the defendant to appear and answer the said demand. This petition pursues the directions of the act as to the form. The summons in the case at bar requires the defendant to appear and answer the plaintiff in a plea of debt, damages and costs. The Legislature have not declared what shall be the form of action of the summons. It is contended by Mr. Givins for the plaintiff in error that the summons should have run thus, to-wit: to answer the plaintiff the said demanded, or the said demand in the petition mentioned. We are of opinion there is no variance between the petition and summons in this case. The demand in the petition is for a debt and also for damages and costs. The demand which the summons requires the defendant to answer to, is a debt, damages and costs. The writ is inartificially expressed, but this cannot do any injury to the defendant. The act of the Legislature authorizes the plaintiff to sue by this proceeding for a debt, technically so called; also to sue for that thing, which otherwise must be sued for in case of assumpsit. If the thing to be sued for is debt, we see no reason why the writ should not be in debt. If the injury lies in assumpsit, there can be no reason why the writ should not be in assumpsit.

(230) The act does not say in what form of action the writ of summons shall be. We therefore conclude that the form best adapted to the nature of the complaint might well be used. It is contended that this proceeding is legally denominated an action of petition and summons. It cannot be material by what name it may be called. It is sufficient for the purposes of justice that the substance of the law has been pursued; which we believe in this case has been done.

The judgment of the Circuit Court is affirmed with costs.

(a.) See *Buckhart v. Watson*, 4 Mo. R., p. 73.
Hoover & Hayden v. Hays, 5 " " 127.

CLENDENEN v. PAULSEL.

A. covenanted with B. to build a house of a certain description for a price mentioned in the covenant. B. covenanted to pay the price agreed on for the work when done. After A. had performed a considerable part of the work under the covenant, B. refused to let him proceed any further. A. desisted and brought an action of assumpsit for the amount of work done. It was held that A. could not recover in assumpsit, but that as B. prevented him from fulfilling his covenant, he might have sued on the covenant and have alledged the prevention, in which case he would have been entitled to his money, as if he had performed his covenant. (Note a.)

ERROR to the Circuit Court of Cole county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of assumpsit brought by Clendennen, the plaintiff, against the defendant, for work and labor. The defendant pleaded non-assumpsit. Paulsel, the defendant, had judgment. It appears by the record that the plaintiff, and his brother Daniel, entered into a covenant to build a house of a certain description for Paulsel, at a price mentioned in the covenant. Paulsel covenanted to pay the price agreed on for the work when the same was done. After the covenant was made, Daniel Clendennen refused to have any thing more to do with the business, and gave the same entirely up to John. He then went on under the covenant and performed a consider-
(231) able part of the work under the covenant, when Paulsel refused to let him proceed any farther. He desisted and brought his action of assumpsit alone for the work done.

The defendant moved the Court to instruct, &c.,

That if the plaintiff could recover at all, it must be on the covenant; and that he could not recover in this form of action for work done under the covenant; which instruction the Court gave. This opinion of the Court is assigned for error. It is insisted by Messrs. Hayden and Scott for the plaintiff in error, that where a contract is put an end to by the party, the other party may consider the whole contract as rescinded, and go for the work as if no special contract or covenant existed. The first case cited to support this position is, 1 Cain's R. 47, *Weaver v. Bently*. This was a case of a covenant on the part of Bently to deliver to Weaver a lease of a lot of ground by a certain day, and in default thereof two notes on Weaver were to be paid. Weaver on his part did not sign the covenant, nor does it appear by the covenant what Weaver gave as consideration thereof. Bently failed to deliver the lease. Weaver paid several sums of money as a part of the consideration, then brought his action of assumpsit to recover the money back. The majority of the Court held that the plaintiff had his election either to affirm the contract or go on the covenant, or to disaffirm the contract and recover back the money which he had paid. Livingston, Justice, dissented. His ground of dissent is, that as the plaintiff had his remedy on the covenant, he must resort to that alone. It is our opinion that Livingston was right, and the Court was wrong. The authorities and cases, cited by Messrs. Wel-

Clendennen v. Paulsel.

and Leonard for the defendant, will in our opinion show what the true law is. The first authority is 1 *Chit. Pleading*, 91, which says where the party has a higher security, he must found his action thereon. In page 92 he says assumpsit will not lie where there has been an express contract under seal. But he says it would lie if the deed were signed by the plaintiff only. That rule applied to this case would be that, (232) if Paulsel, in this case, had not signed the covenant, then Clendennen, after having performed the covenant, or having been prevented, must bring his action of assumpsit.

There are many other cases given where a deed may have been concerned between the parties, and assumpsit will lie; but the case at bar does not come up to any of them. The next authority cited is that of Young v. Preston, 4 *Cranch*, 239, cited in *Condensed Reports*, 98. This was an action of assumpsit for work and labor. It appeared in evidence that the plaintiff had done the work under a sealed instrument, and had been prevented by the defendant from doing the balance.

The Supreme Court of the U. S. held that as the plaintiff had a clear right of action under the covenant, he must resort thereto. 3 *Starkie*, 1762, is to the same point, where it is said that when the parties have made an express contract, none can be implied. We consider the rule as laid down in the case of Young v. Preston, is the true one. Many other authorities have been cited to the same point. We are willing to admit that it has been held in some cases as cited by the plaintiff's counsel, that where the party has covenanted to do an act, and has failed, the covenantee has been allowed to recover the money paid in assumpsit. But if any of these cases establish the doctrine that the party can sue in assumpsit where he has a security of a higher nature, on which he can sue, we have no hesitation in saying the cases are not law. 1 *Powell on Contracts* is cited by the plaintiff, page 417, where it is laid down that if he who is to be benefitted by another's fulfilling a contract, is the occasion why it is not fulfilled, the contract is thereby entirely dissolved, and the party bound is discharged from his obligation. This rule applies to this case in this way, that if Paulsel prevented the plaintiff from fulfilling his covenant, then he may sue on the covenant and alledge the prevention, and will be entitled to his money as if he had performed the covenant. It cannot mean that the matter is to be considered as if the sealed instrument never had been made. According to this view of the subject, the judgment of the Circuit Court is affirmed with costs.

(a.) See *Helm v. Wilson*, 4 Mo. R., p. 43.
Raymond v. Fisher & Hanson, 6 " " 30.
Jarrel et al. v. Farris, adm'r, 6 " " 160.

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CRUMP v. MEAD ET AL.

Where a party has a covenant or sealed instrument in regard to the matter of the contract, he must rely on that, and cannot abandon his contract or agreement at pleasure, and resort to assumpsit for work and labor generally. (Note a.)

APPEAL from Circuit Court of Callaway county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of assumpsit brought by Mead against Crump for eight month's work. This suit was commenced before a Justice of the Peace, where Mead had judgment. An appeal was taken to the Circuit Court. The plaintiff again had judgment. The judgment was rendered against Crump and his securities. They have appealed to this Court. It appears by the bill of exceptions that Mead worked for Crump in the year 1831, till July 1832, in clearing land and raising a crop of corn; that he then left Crump and went away. Crump then gave in evidence the following covenant, to wit: Articles of agreement made and entered into this 10th day of November, 1831, by and between Armstead Crump of the one part, and Joseph Mead of the other part. The said Crump doth obligate himself to find Joseph M. Mead twelve months, in the term of that time the said Mead is to clear land and crop with Crump, and Crump is to find every thing necessary to go on with the crop. Crump obliges himself to give the said Mead the third of the crop on the land he has now cleared, and the half of the crop on the ground that they clear and fence, The understanding is, the crop of corn that is raised on the place, every thing else excepted. Sealed, &c. Both sign the instrument. It was proved that Mead acknowledged that he was bound to Crump in a writing with regard to the work he was doing for Crump. Much other testimony was given relating to the matter, which we deem it unnecessary to state. None was given however which varied the matter with regard to the matter of the covenant and the work done under it. The appellant, Crump, then asked the Court to instruct the jury that if they believed the work which Mead did, was done under the covenant, then he could not recover in (234) this action. The Court refused to give this instruction. The Court erred in refusing this instruction. The case of Clendennen v. Paulsel, decided at this term, decides the law to be that where a party has a covenant or sealed instrument in regard to the matter of the contract, he must rely on that, and cannot abandon his contract or agreement at pleasure, and resort to assumpsit for work and labor generally. Here Mead was bound by covenant to work twelve months for a stipulated reward. He abandoned his employment without any default on the part of Crump, as far as we see. He cannot be permitted at his own will and pleasure to disregard his contract for corn, and go for cash. Many other instructions were refused which need not now be noticed.

The judgment is reversed, and the cause remanded to the Circuit Court for further proceedings.

(a.) See Raymond v. Fisher & Hanson, 6 Mo. R., 30.

RUNKLE v. HAGAN.

1. A notice of appeal, not objectionable in the language, given by an agent, and signed "William Runkle by Wm. K. Vanarsdale," is good.
2. It is error to dismiss an appeal from a Justice, and then to reverse his judgment.

TOMPKINS, J., delivered the opinion of the Court.

Hagan sued Runkle before a Justice of the Peace and had judgment. From this judgment Runkle appealed to the Circuit Court of Monroe county, where judgment being again given against him, he appealed to this Court. In the Circuit Court the appellee moved to dismiss the appeal, because the appellant had not given sufficient notice of his appeal, it being taken after the day of trial. No objection was taken to the language of the notice of the appeal; but it was given by an agent and signed thus: "William Runkle by Wm. K. Vanarsdale." The Circuit Court for that reason dismissed the appeal, and reversed the judgment given by the Justice in favor of the (235) plaintiff below, appellee here. In the opinion of this Court, the notice of the appeal was good. But if it were even doubtful whether the person giving the notice were authorized, and the Court on suggestion were disposed to inquire in the absence of the appellant into his power, we see no reason why evidence, *and parol evidence*, should not be received to show the authority of the agent. The Court erred then, we think, in dismissing the appeal; but after the appeal (by which alone the Circuit Court had jurisdiction of the cause) was dismissed, that Court proceeded to reverse the judgment of the Justice, and give judgment for the appellant for his costs before the Justice. In this we think the Court erred also, because after the appeal was dismissed, that Court had no more right to meddle with the cause than before the appeal was taken. The judgment of the Circuit Court is reversed, and the cause remanded, and that Court is directed to reinstate the cause and proceed to trial.

Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, OCTOBER TERM, 1833.

McGIRK v. CHAUVIN, ADM'R OF CHEVALIER.

A. commenced suit against B. to have a demand allowed against him as administrator of C. It was proved that in her lifetime, C. had executed to A. her obligation to pay him three-fourths of all the damages and wages recovered in four actions of replevin to be by her commenced for four negroes; and in case of a recovery of all the negroes, the further sum of three hundred dollars; and in case of a recovery of only a part of them, then a proportional part of the three hundred dollars. A suit commenced for one of the negroes in the lifetime of C. was, after her death, compromised by her administrator B. The negro was delivered to him, and he accepted one cent damages, for which judgment was rendered. It was in proof, that at the time of the entry of the judgment according to compromise, the services of the negro sued for were worth several hundred dollars. The County Court allowed A. the fourth part of the three hundred dollars, being seventy-five dollars, and three-fourths of the damages, being three-fourths of a cent. On appeal, the Circuit Court affirmed this judgment. On appeal from the Circuit Court it was held, that as it did not appear, that by a diligent prosecution of the suit to final judgment, more than one cent damages could have been recovered, the judgment of the Circuit Court must be affirmed.

APPEAL from St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

McGirk, the plaintiff in error, applied to the County Court of St. Louis county to have a demand allowed against Chauvin as administrator of Helene Chevalier. That Court allowed him seventy-five dollars and three-fourths cents; he appealed to the Circuit Court of said county, where the judgment of the County Court being affirmed, he appealed to this Court.

McGirk v. Chauvin.

The evidence preserved shows that on the 28th day of August, 1816, Helene Chevalier, the intestate, executed to McGirk an obligation in these words, viz: "I promise to pay Matthias McGirk for value received of him, three-fourths of all the (237) damages and wages that I may recover in four actions of replevin to be by me brought, to wit: one against Pierre Chouteau, senior, for one negro boy named Paul; one against Sylvester Labadie for a negro boy named Antoine; one against Marie Antoinette Honey, otherwise Labadie, for a mulatto woman named Sophie; and one against John Pierre Cabanne for a mulatto girl named Clarisse; and I also promise to pay him the sum of three hundred dollars when the above suits shall be ended and a recovery in my favor; and if there shall be a recovery of some of the above slaves in my favor, then the three hundred dollars to be apportioned according to the number recovered, and to be paid accordingly;" and that the intestate in her lifetime also sued Chouteau to recover the said boy Paul, and Chauvin as administrator becoming the plaintiff, compromised the suit with Chouteau; Chouteau surrendering the negro to Chauvin, and Chauvin accepting one cent damages, for which judgment was accordingly entered. The plaintiff in this cause also showed that at the time of the entry of said judgment according to the compromise, there were sundry depositions taken on the part of the plaintiff in the action compromised as aforesaid, and then remaining on file in the Circuit Court where the action was pending, from which it appeared that at the time of the compromise and judgment aforesaid, Paul had been detained for several years from said Helene Chevalier, and that his services during the time he was so detained were estimated at several hundred dollars. Evidence was also given by the plaintiff in this cause, of the amount of damages which said Helene was entitled to recover of Chouteau. No exception had been taken to the depositions. The Circuit Court, on motion of Chauvin, administrator of Helene Chevalier, decided that McGirk, the plaintiff in this cause, could not recover against Chauvin on account of damages due to him as administrator from Chouteau, more than three-fourths of the damages actually recovered in the action against Chouteau above mentioned.

On the part of the plaintiff in this cause, it is contended that the one cent damages (238) recovered by the administrator against Chouteau are merely nominal, and that a fair consideration appearing on the face of the contract entered into by his intestate with the plaintiff in this cause, it became his duty to prosecute the action diligently, and that the true measure of damages being the worth of the services of the slave, &c., the plaintiff in this cause had a right to recover against him in his representative character three-fourths of whatever sum he might, by using due diligence, have recovered against Chouteau. Admitting the law to be as contended by the plaintiff, and we have no disposition to deny that it is so, yet it does not appear to us that Chauvin, by a diligent prosecution of the suit against Chouteau to final judgment, could have recovered more than one cent damages. The plaintiff gave evidence before the Circuit Court, it seems, that the services of Paul, during the time he was detained by Chouteau from Helene Chevalier, were worth several hundred dollars. Evidence, we are told, was also given of the amount of damages which said Helene ought to have recovered of Chouteau. But we are not told that this was all the evidence given before the Circuit Court. For any thing we see on the record, Chauvin might have given evidence to the Court that Paul's services during the time of his detention from the intestate were worth nothing, and that in fact she was entitled to recover against Chouteau only nominal damages, or that Chouteau

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himself was insolvent. Where we are not precluded by an entry on the record, we are bound to presume every thing to sustain the judgment of the Circuit Court. We will therefore presume that that Court had before it other evidence than what is shown to us; and this cause being submitted to the Court, neither party requiring a jury, and no instruction being asked, we must presume that the Court decided on sufficient evidence that the plaintiff in this cause could not recover against Chauvin as administrator, more than Chauvin himself had in fact recovered against Chouteau. The judgment of the Circuit Court is therefore affirmed.

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Where covenants are mutual and independent, either party may recover damages from the other for an injury which he may have sustained by non-performance.
(Note a.)

APPEAL from the Circuit Court of St. Louis county.

TOMPKINS, J., delivered the opinion of the Court.

Cook commenced an action of ejectment against Johnson for certain lands lying in St. Francois county. The case was transferred from that county to St. Louis Circuit Court, because the Judge of the Circuit Court in which the suit was commenced was related to the plaintiff. The judgment of the Circuit Court of St. Louis county was against the claim of Cook, and now he appeals to this Court to reverse that judgment.

On the trial of the cause in the Circuit Court it was proved that Cook and Johnson agreed to exchange lands. The lands of Johnson lay in the county of Cape Girardeau; and those which Cook agreed to give in exchange lay in the county of St. Francois. On the 8th day of November, 1827, Cook made to Johnson a covenant in the words following: "Know all men by these presents, that in consideration of an agreement by deed made between myself and John Johnson of Cape Girardeau county, Missouri, to convey to me a tract of land in said county in exchange for the land herein mentioned, which I agree to exchange therefor, I do hereby covenant and agree as follows, that I have," &c. He then sets out his equitable claim to several tracts of land, and then adds, "now I hereby bind myself, my heirs and assigns, to make or cause to be made to the said John Johnson, his heirs and assigns forever, a good and sufficient deed of conveyance in fee simple to three hundred acres of land, which I claim as aforesaid, to be taken off as follows," (here follows a description of

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the lands agreed to be exchanged,) "it is agreed that Johnson may take possession of the land hereby agreed to be conveyed immediately, except that part which I claim (240) from the bond of said Kinkaid. Said Johnson is also to be protected in the quiet possession, and I am to make him a deed in due form of law to the land agreed to be conveyed so soon as I can conveniently get a complete title from the said Kinkaid, which shall at all events be within two years." The covenant of Johnson to convey to Cook was a copy of the above except in the description of the parties and of the lands agreed to be exchanged. Cook afterwards procured complete titles to the several tracts of land composing the tract of three hundred acres, which he covenanted to convey to Johnson: that is to say, he obtained patents from the United States for some and a deed from Kinkaid for the portion which Kinkaid had agreed by his bond to convey.

The deed of Kinkaid to Cook was dated the 5th November, 1829, acknowledged on the 6th day of that month, but not filed for record till the 24th. On the 7th, 8th and 9th days of the last mentioned month, Cook tendered to Johnson a deed for the three hundred acres of land which he had, as above stated, covenanted to convey to him, and offered to deliver the same to him if he would then and there perform his covenant aforesaid by him made to the said plaintiff. The land conveyed to Cook by the above mentioned deed of Kinkaid, constituted a part of this tract of three hundred acres. When the tender of Cook's deed was made to Johnson on the 7th November, he admitted that he was not then ready to perform his covenant; but when the tender was again made on the 9th day, Johnson tendered Cook a deed for two hundred and fifty acres, which Cook refused. The defendant then moved the Court to instruct the jury, that on the case made out the plaintiff could not recover, and the Court gave such instructions. To this opinion of the Court the plaintiff excepted and assigned it for error.

On the part of the appellant, it is contended that if the covenants are dependent, that Cook having tendered a deed in conformity with his agreement and Johnson not being in a situation to comply with his part of the contract, Cook may rescind it and bring his action of ejectment for the land he had given into Johnson's possession.

(241) But should the covenants be considered independent, then the plaintiff's legal title must prevail over the equitable title of the defendant, and that the plaintiff's covenant for the defendant's quiet enjoyment of the possession did not avail him after the lapse of the two years within which their deeds were respectively to have been made. This Court believes that the covenants of Cook and Johnson are mutual and independent, and that either party may recover damages from the other for the injury he may have sustained by non-performance.

The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and however transposed they may be in the deed, their preceding must depend on the order of time in which the intent of the transaction requires their performance. See 1 *Chitty Pleadings*, p. 311. With this view of the case, it seems unnecessary to decide on the sufficiency of the title which Cook tendered to Johnson. The covenants being considered as independent of each other the appellant has nothing to rest on but his legal title, which he contends must prevail over the equitable title of the defendant, his covenant for quiet possession enduring, as he contends, only for two years. By the covenant, as above stated, Cook agreed to convey at all events within two years to Johnson, and according to the terms of

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the covenant, there seems to be no other consequence of a failure than the forfeiture of five hundred dollars, for which, as far as we can see, he relies on the personal security of Johnson ; and in a preceding part of the covenant he had said, " said Johnson is to be protected in the quiet possession without limiting the time of the protection. Here it will also be recollect that the consideration moving Cook to make this covenant was an agreement by deed made between himself and Johnson to convey, &c., two covenants both independent of each other and both to be performed in two years at least. To us it seems that as the parties have not themselves limited the time the covenant for quiet possession is to endure, and as neither of them seems to have provided for any other consequence than a payment of damages by the person failing to convey within the two years, the covenant for quiet enjoyment is still in force, and if such be the case, the legal title of the plaintiff avails him nothing. Right on the demise of *Green v. Proctor* is a case in point. See 4 *Burrill* 2208.

The judgment of the Circuit Court is, therefore, affirmed.

(a.) See *Lucas v. Clemens et al.*, 7 Mo. R., p. 367.

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APPEAL from St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Cook brings his action of covenant against Johnson, and judgment is given against him. He appeals to this Court. Cook in his declaration alleges performance of all things he was bound to do, and assigns for breach that Johnson had not conveyed certain lands according to his covenant. Johnson pleads that Cook had not on a certain day, any deed on file in the Circuit Court for record for him, Johnson, thereby meaning to put in issue the sufficiency of the title of Cook to some lands which he, Cook, had averred an offer to convey in performance of his covenant. To this plea the plaintiff demurred, and the Circuit Court overruled the demurser. The covenant here sued on is the same given in evidence in the action of ejectment between the same parties brought up and decided at this term in this Court. That covenant being decided to be independent of Cook's covenant to Johnson, the plea is bad, and the judgment of the Circuit Court must be reversed, and the cause remanded.

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HILL & THOMAS v. WRIGHT.

1. Having made two grants of land in 1769 on the same day, one of which was afterwards confirmed by the United States, is not sufficient evidence that the grantor was at the time an officer of the French or Spanish government, invested with power to grant lands.
2. A grant existing on the land book called *livre terrien* will not be considered as existing by matter of record, without evidence that the *livre terrien* is of itself a record.

ERROR to St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of ejectment brought by Wright against Hill and Thomas for a lot or piece of ground situate in or near north St. Louis. The declaration is in the usual form, plea the general issue, a verdict and judgment were given for Wright the plaintiff. On the trial the plaintiff gave in evidence, by consent, a translation of a concession to Joseph Brazeau dated 20th June, 1794, whereof the following is a copy: To Don Zenon Trudeau, Captain in the fixed regiment of Louisiana, Lieutenant Governor Commandant in chief of the western part of the Illinois, humbly prayeth Joseph Brazeau, resident in this village of St. Louis, has the honor to set forth that he wishes to obtain a tract of land situate to the north of this village, beyond the mound called *la grange de terre*, to be four arpents wide extending from the bank of the Mississippi west by south (o 1-4 g o) by about twenty arpents in length, commencing at the ridge where the said mound stands, and extending towards the N. N. W. as far as the stony creek or near it, so that the said tract shall be bounded on the east by the bank of the Mississippi, and on the other sides by the domains of his majesty and partly by lands re-united to said domain, over which the present concession actually extends in order that the petitioner may gather hay therefrom for his cattle, &c. &c., and your petitioner will ever pray, &c. St. Louis, 1st June, 1794. J. Brazeau. Then follows the concession of the Lieutenant Governor. We, Lieutenant Governor and Commander in chief of the western part of Illinois, having ascertained that the tract asked by the petitioner belongs to his majesty's domain, part thereof having reverted to said domain in consequence of the relinquishment of the former proprietors and the other part having never been conceded, and as no one is injured thereby, do therefore certify that said Jo. Brazeau has been put in possession of the piece of land described in his petition, having four arpents in front by twenty in depth, which extends N. N. W. from the foot of the ridge whereon the *grange de terre* stands, up to stony branch or near it, bounded on one side by the Mississippi banks, and on the opposite side by land not granted or re-united to his majesty's domain, and at one end, that is, N. N. W., bounded by the stony creek or its vicinity, and towards the S. S. E. by the concessions granted to a free mulatress named Esther. In faith whereof we have given the present in the town of St. Louis the 10th June, 1794. Zenon Trudeau, Lieutenant Governor, &c. &c. Then follows

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a grant of the Lieutenant Governor to Brazeau for the land, in form dated 20th June, 1794. On the 12th day of May, 1798, Joseph Brazeau made his deed to Louis Labeaume for the tract of land above granted to him, reserving to himself four arpents to be taken at the foot of the mound or little hill in the south part of the said land, selling to Labeaume only sixteen arpents in depth. On the 15th February, 1794, Labeaume presented his petition to the Lieutenant Governor, setting forth that he had purchased Brazeau's land, and praying that the Governor would grant him 360 arpents, including the quantity he had purchased of Brazeau. The boundaries of the land are set forth as follows: twenty arpents in depth from the Mississippi up stony creek W. S. W. by sixteen arpents in front along the Mississippi, to begin at the intersection of the road with the creek, which is the same front with the petitioner's land, the space included within the perpendicular from the road to the river, the creek and the river will nearly complete the quantity asked by the petitioner. A copy of a survey made by A. Soulard, Surveyor General, was given in evidence, together with the order of the Governor to Soulard to make the survey, and with an order to (245) put petitioner in possession. On the 3d of September, 1806, Labeaume presented his petition and order of survey to the board of commissioners for the adjustment of land claims for confirmation, which was rejected. On the 22d day of September, 1810, the board again took up Labeaume's claim and confirmed the same to the extent of three hundred and fifty-six arpents, reserving to Brazeau his four arpents reserved by him in his sale to Labeaume. It was proved on the trial of this cause that Labeaume in May, 1800, worked on the tract of land mentioned in the survey; that he dug a ditch around a part thereof; that he built a house about the centre of the tract. A plat and survey of the claim of the plaintiff and also of the claim of the defendants' made by order of the Court, was given in evidence. It was admitted on the record that in 1816, Labeaume sold the said tract of land to Chambers, Christy and Wright, the plaintiff, and that subsequently there was a partition of the land between them, and that the lot now in dispute fell within Wright's share. It was also admitted that the defendants were in possession of the land sued for. The defendants claimed under a concession made to one Labuxiere in the year 1769, by one St. Ange. They claim under the heirs of Labuxiere, which concession covers the parcel of land of which the jury found them guilty. The evidence accompanying this concession, is a certified copy made by the recorder of land titles for the State of Missouri, under the act of Congress from a paper book called *Livre Terrien*, No. 1, pp. 28 and 29, by which it appears that on the 18th day of July, 1769, St. Ange and Labuxiere granted or conceded on the demand of the widow Hebert a title to her and her heirs of a tract of land two arpents broad by the ordinary depth of forty arpents, its width fronting on the Mississippi, bounded on the north by Labuxiere, &c., on certain conditions therein mentioned. Also a copy of a concession taken from *Livre Terrien*, No. 1, folio 30, read by consent, which is as follows: Sr. Labuxiere on the 18th day of July, 1769, on the demand of Sr. Labuxiere, attorney for the King, who has exposed to us that he has no prairie to make hay, that the one (246) we have granted to him between the Rivulet of Belle Fontaine and stony run is barely sufficient to plow, &c., that we be pleased to grant to him about two arpents of land and more should there be any found which has not been granted, which are bounded on the one side by the stony run and on the other side by the land of the widow Hebert, on the one end or width by the bluffs of the Mississippi on the ordinary depth of forty arpents. Thereupon we have granted and do grant to Sr. La-

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buxiere the said two arpents of land in width, and more should there be any found on the depth of forty arpents in the same way and manner as above designated, &c. (Signed) St. Ange. Labuxiere. Then the defendant gave in evidence a copy of certain confirmations by the recorder of land titles for Missouri, by which it appears that a concession to widow Hebert for a tract of land of two arpents by forty has been made which lies in and about the place the land lies which was granted to St. Ange to [by] her in 1769. The defendant also proved that Joseph Labuxiere cultivated land south of rock creek and north of Madame Hebert, 8 or 9 years. He cultivated there both before and after the massacre, which was in 1780. There was no enclosure about it except the common fence. Labuxiere was not a man who worked himself, but his slaves worked it. A few years after the massacre, the people generally left their lands for fear of the Indians. Some remained and worked their lands with their arms in their hands. Witness says he knew Labuxiere's hands to work there 55 years ago. Another witness knows that Labuxiere cultivated land south of the rocky branch, between the road and the river, 64 or 65 years ago, and continued to cultivate until the Americans scared him away, says it is about 42 years since he first heard of Labuxiere's death, says Labuxiere went to Cahokia about the year 1782 or 3.

It was proved by another witness that about 15 years before the trial in 1832, La-beaume applied to his mother, Mrs. Hebert, to buy her claim. It was admitted by the parties that Joseph Labuxiere died at Cahokia in Illinois, 29th of April, 1791, (247) that he left heirs now living in Missouri and Illinois, and that the defendants have acquired by purchase of the heirs all the right which the said Joseph Labuxiere had in the lands in question at his death, which may not have been forfeited or abandoned.

The defendants offered in evidence a general notice of sundry gentlemen, residents of St. Louis, which notice began thus: To the Recorder of Land Titles. Sir, for the benefit of all interested, please to record the registered concessions of Livres Terrien, No. 1, 2, 3, 4, 5 and 6, on file in your office, which was certified by the Recorder of Land Titles for the present time; this notice was rejected by the Court. The defendants then asked the Court to give the jury about twenty instructions, as follows:

First. That in July, 1769. St. Ange had power to originate the title under which the defendants claim, and which has been given in evidence.

Second. That this grant gave to Labuxiere a good title.

Third. That the power of St. Ange to make the grant in question, may be inferred from the practice of the French Government in making similar grants, and by the exercise of the power.

Fourth. That the jury are to presume that St. Ange, who acted as an officer of Spain in 1769, was such officer, and that as such officer he did his duty and did not exercise an authority not given to him by law.

Fifth. That the rules and regulations of the French Government, with regard to the distribution of lands in Upper Louisiana, prevailed there until 1769, if not until Nov. 1770, and were adopted by Spain as her regulations for that purpose.

Sixth. That if Labuxiere, by permission of St. Ange in July, 1769, went into possession of the land in question, and possessed the same for more than ten years from that time, or for any period of ten years during the time Spain had the possession of Louisiana, such possession gave Labuxiere a right to the land in question.

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Seventh. That if defendant has proved Labuxiere once in possession of the land in question, the jury are to presume he remained in possession until his death, unless the contrary is proved.

(248) Eighth. That a person having a just title to land, evidenced by a grant to him, shall not be considered as having abandoned his right to said land by removing from it; but to show an abandonment, there must be proof that he left the land with the intention of abandoning his right thereto.

Ninth. That if Labeaume obtained his order of survey under which the plaintiff claims, by false and fraudulent representations, or in bad faith, he nor those claiming under him can claim the land in question by prescription.

Tenth. That the law of prescription, which formerly existed here, ceased 1st June, 1816, and if defendants' right to the land in question was not barred by prescription, then it cannot be so barred now.

Eleventh. That if Labeaume possessed said land in bad faith, the plaintiff cannot make title to said land by adding to the time he possessed it, the time Labeaume possessed it.

Twelfth. That the confirmation of Labeaume's claim by the U. S., operates merely as a relinquishment of their claim to the land to him; but cannot so operate as to defeat the claims of Labuxiere or his heirs, if he or they had any good claim to the same.

Thirteenth. That if the claim of Labuxiere or his heirs to the land is not legal and complete, but is equitable and inchoate, it is protected by the treaty of 30th April, 1803, between France and the U. S., and could not have been the subject of a grant to Labeaume claiming adversely.

Fourteenth. The French commandant, St. Ange, had authority to make the grant of land to Labuxiere, a copy of which, taken from the provincial land book called Livre Terrien, has been given in evidence in this case.

Fifteenth. The authority of St. Ange, the French commandant, to make the grant to Labuxiere, may be inferred from the exercise of the power and the practice of the country.

Sixteenth. If the jury shall be satisfied from the evidence, that the order of survey and the confirmation in favor of Labeaume, which have been given in evidence, were made in prejudice of the rights of prior claimants of the land, whose titles are confirmed, then the order, and survey, and confirmation, are invalid in point of law as against such prior claims so confirmed.

Seventeenth. That the confirmation to Labeaume, as given in evidence, does not vest in him, and those claiming under him, a title either absolute in itself or paramount to any older claim which has been since confirmed.

Eighteenth. That the confirmation of Labeaume is not a legal title sufficient in law to defeat the claim of Labuxiere, or those claiming under him, inasmuch as the claim of Labuxiere is evinced by a grant of St. Ange.

Nineteenth. If the jury are satisfied from the evidence that a grant was made by St. Ange, absolute in its terms, which stands unannulled on the land book in favor of Labuxiere, such title is sufficient to bar the recovery of the plaintiff in this case.

Twentieth. The French commandant, St. Ange, had authority to make the grant to the widow Hebert, a copy of which taken from the provincial land book called Livre Terrien, a copy of which has been given in evidence in this case.

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The Court refused to give these instructions, and in lieu thereof gave the following:

First. That if St. Ange had not power to grant titles to land in the upper part of the former province of Louisiana in 1769, his acts in originating titles have been legalized and sanctioned by the governments that succeeded the French Government in 1762, in cases where the government and the grantee were alone concerned.

Second. That confirmations by the Board of Commissioners operates only as an acknowledgment by the Government of the U. S., that the claimant has a right to a patent from the U. S.

Third. That the mere removal from a tract of land does not of itself amount to an abandonment of the right and title to said land.

Fourth. The presumption in law is always in favor of the official acts of persons duly commissioned or qualified to act, in the station or capacity to which their acts relate.

The defendants excepted to the instructions refused and to those given. It seems (250) to us that no error has been committed by the Court as to the instructions it did give, they are all of them as far as they go in favor of the plaintiffs in error. We will not undertake to investigate each of the instructions refused, because we are of opinion that the nineteenth instruction, asked by the plaintiffs in error in the Court below, brings up every question which could be considered under all the other instructions.

The nineteenth instruction asked assumes that if the jury are satisfied from the evidence that a grant was made by St. Ange, which was absolute in its terms, and which stands unannulled on the land book or Livre Terrien, in favor of Labuxiere, such title is sufficient to bar the recovery of the plaintiff.

The first point to be inquired into, is the power of St. Ange to make the grant.

Who St. Ange was we cannot ascertain from the record. Whether he was an officer of the French Government in 1769, at the date of his grant, or whether of the Spanish Government, which about that time succeeded to the French Government, or whether he was an officer of either of them, or indeed any officer at all, we cannot say. The only evidence on the record with regard to that matter is, that it appears that on the same day he made the grant to Labuxiere, he also made a grant of two arpents of land by forty to the widow Hebert. This, it is said, is proof enough that St. Ange was in truth an officer of the then existing government of the country, and that being an officer he had power to grant lands. In neither of these grants, by the words in them, does he assume to be an officer of any government whatever. The Circuit Court was called on to say that because the American Government confirmed to the widow Hebert her claim, that that is a recognition that St. Ange was an officer having power to grant land. With regard to that matter, we will only say that the American Government might, as between itself and the claimant, do whatever it chose, it might confirm the land to those who set up a claim thereto, or it might give it away; and furthermore, we only have before us one case (251) in which the American Government has recognized St. Ange as being an officer; and even in that case the record of confirmation shows that the claim was confirmed on the ground of possession and cultivation prior to 1803, and not on the ground of a concession made by a French officer having power to grant land.

But it is insisted that inasmuch as this grant was recorded or rather existed on the provincial land book called Livre Terrien, that it is to be considered as existing by

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matter of record, and that its verity cannot be disputed. The record no where shows us what is the true character of this book, called a land book. It may or may not be a record of Spanish or French grants of land. Whence this book came we do not know. Whether it was found in the public archives handed over by the Spanish authorities to the American officers, who received possession of the country, or not, we cannot say. There is on the record no evidence that the fact is so. Some proof ought to have been offered and placed on the record to satisfy the Courts of Law whether the *Livre Terrien* is of itself a record or not.

Before we conclude the case, we will say a few words more with regard to St. Ange and his power to grant lands under the French Government. By a royal ordinance of the King of Spain, dated 24th August, 1770, it is recited that the Lieutenant General Don Alexander O'Reilly, in his letter No. 33, written at that place under date of the 1st March, transmitted to me copies of the instructions framed for the Lieutenant Governor established in the Illinois, that of the Natchitoches, and the nine particular Lieutenants of the districts of this province, he states that he repaired, &c., to certain places, and the grants of lands within this province have been entrusted by His Most Christian Majesty to the Governor and Commissary *Ordonnateur*, and that he considers it expedient that henceforth the Governor alone be authorized by His Majesty to make such grants. We know the Governor of the province of Louisiana did not reside at St. Louis. St. Ange made his grant at St. Louis. (252) The Commissary of the French Government, according to O'Reilly's opinion, could also grant lands; we see nothing which shows that St. Ange was that officer.

This we think is enough to show that the defendants have no sufficient bar against the plaintiff's right to recover. The plaintiff is entitled, under his confirmation, to recover according to the statute of this State. The Court did not err in refusing the nineteenth instruction asked by the defendant's counsel. The judgment of the Circuit Court is affirmed with costs.

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A general assignment to a trustee, without a schedule of the property conveyed, or of the creditors provided for, will be good and effectual. (Note a.)

ON A WRIT OF ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

The plaintiff sued Keen and Page by attachment in the Circuit Court, and summoned the defendants as garnishees. Judgment was rendered against the defendants,

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Keen and Page, and one of the garnishees, and in favor of the other garnishees, the defendants in error; to reverse which the plaintiff now prosecutes his writ of error in this Court. The facts disclosed in the answer of the garnishees are, "that on the 5th of July, 1831, the defendants, Keen and Page, who had previously been partners in mercantile business, dissolved partnership on such terms that all the stock, goods, debts and effects of the firm became the sole property of the partner Page, who took possession of the same and carried on the business until the 13th of the same month, when he executed a deed of that date to John H. Gay, and John Smith and Brother, conveying all his household furniture, goods, chattels, merchandize, debts, and sums of money, due and owing or belonging unto him said Page, and all securities taken (253) and obtained for the same, of whatever kind or nature, or wheresoever the same may be found in either Missouri or Illinois; To have and hold the same in trust; to collect the debts and convert the property into money, and out of this fund to pay first the expenses of the trust, the sums due to the clerks and servants as privileged debts, and then \$4,000 to an endorser for Keen and Page; then to pay other securities, endorsements, and borrowed money; and next to pay moneys due on consignments, and for rent of the warehouse; and the balance to pay over generally to the creditors of Keen and Page, proportionally according to their respective claims; and the surplus, if there should be any after paying all the debts, to pay over to said Page or his representatives." A general power was contained in the deed authorizing the grantees to collect debts, &c., and to constitute and appoint one or more attorneys under them as substitutes to fulfil and execute the same duties and powers under the deed. Page put the above named trustees, Gay, Smith and Brother, into possession of all his effects. They took and kept possession of the same until the 12th of August thereafter; when, at the request of many of the creditors provided for in said deed, and with the consent of Page, they executed a deed to the defendant garnishees, Savage and Tabor, transferring the same goods, effects, &c., to them as trustees for the same uses and purposes. Savage and Tabor took immediate possession of the property under said deed, and were proceeding in the discharge of their duties as trustees under said deed, when the attachment was served on them. Interrogatories were submitted, in answer to which the garnishees set out in substance the facts as above stated, and deny that the effects in their hands are liable to the attachment. No issues were made up for trial. Judgment was given upon the answers of the garnishees, which were not denied, and the sole question arising on the record is, whether the deed from Page be good and valid in law? It is objected by Mr. Allen for the plaintiff in error that the deed is void.

First. For want of certainty in the description of the property conveyed; and, (254) Second. Because it establishes a preference among the creditors of the grantor.

The authorities cited do not, as we think, support the position; on the contrary, the law is regarded as well settled that a debtor has a right to prefer one creditor to another. 5 T. R., 420; 8 T. R., 521; 2 J. C. R., 306; 4 J. C. R., 529. And that a general assignment, without a schedule of the property conveyed, or of the creditors provided for, will be good and effectual. 7 Peters' Rep., 613. The judgment of the Circuit Court is therefore affirmed with costs.

(a.) See Duvall et al. v. Blair et al., 7 Mo. R., p. 451; Van Winkle et al. v. McKee et al., 7 Mo. R., p. 435.

CHOUTEAU v. MERRY.

A femme covert is not liable on a note executed by herself, even though her husband has been absent in another State for many years.

IN ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

Merry, the defendant in error, sued Chouteau, the plaintiff in error, before a Justice of the Peace, to recover the amount of a promissory note for \$51 75, and got judgment before the Justice. Chouteau appealed to the Circuit Court, where, on a trial *de novo*, the judgment of the Justice was affirmed, and she now prosecutes her writ of error in this Court to reverse the judgment rendered by the Circuit Court. From the bill of exceptions taken in the cause, it appears "that about twenty years ago, the plaintiff in error intermarried with one Augustus A. Chouteau, with whom she continued to live and cohabit as man and wife, in the county of St. Louis, until the year 1821, when they parted, and the said Augustus A. Chouteau voluntarily left the State of Missouri and established himself in the Arkansas Territory, where he has continued to reside ever since, separate and apart from the plaintiff in error, who continued to reside at St. Louis and lived upon her own means," &c. The note sued (255) on was given on the 21st of February, 1831, and the sole question arising on the record is, was the plaintiff in error liable on her note? It is clear that she was not. Coverture operates a legal disability to contract, and all contracts of a femme covert are absolutely void. The facts in this case do not bring it within any of the exceptions. The cases cited from the English books are where the husbands abjured the realm, or were foreigners residing abroad. The principles settled in those cases do not apply. If by a removal from one State to another, or a separate residence in different States, the indissoluble connexion by which the wife is placed under the power and protection of her husband could be cancelled, and the parties thereby relieved of their respective liabilities and disabilities, there would be little need of troubling the Legislature or the Courts on the subject of divorces. The judgment of the Circuit Court is reversed with costs.

The case of Chouteau v. Merry and Tiffin, depending on precisely the same question, must for the same reason be reversed.

MENARD v. WILKINSON.

Where an immaterial issue had been found for the defendant, it was held that the Circuit Court erred in overruling a motion of the plaintiff for judgment on a material issue.

APPEAL from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action commenced by petition and summons in the Circuit Court, by the plaintiff in error, against the defendant in error, on a promissory note. The defendant pleaded,

First. *Nil debet*; and

Second. A former recovery in an action commenced in said Court by the plaintiff (256) against the defendant, "on the same identical note in the above petition set forth, &c."

Replication of *nul tiel record* to the second plea, and issue on both pleas. No disposition was made of the first issue.

The second was submitted to the Court, and was found for the defendant.

The plaintiff then moved the Court for judgment on the first plea, notwithstanding the finding on the second, because the issue found was an immaterial one, which motion was overruled.

He then moved to set aside the finding of the Court, and for a new trial, (and assigned various reasons,) which motion was also overruled. The plaintiff excepted to the opinion of the Court in overruling these motions, and now assigns them for error. Several points have been presented which we deem it unnecessary now to consider, since we think the plaintiff was clearly entitled to his judgment on the first issue.

The same identical note or piece of paper may have been used in both actions; but it would by no means follow that the same right of action, promise and undertaking was relied on and adjudged in both cases. The note may have been mis-described in the first action, or the plaintiff may have acquired title subsequent thereto. In looking into the record of the first suit, (as set out in the bill of exceptions,) it is shown that the note sued on in both cases is not the same. The descriptions are materially variant, and no parol proof was admissible to contradict the record and establish the identity.

The judgment of the Circuit Court is erroneous and must be reversed with costs, and the cause remanded.

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GRIMSLY v. WHITE.

A. conveyed an estate in fee simple, with a covenant of quiet enjoyment to B. He further covenanted in the same deed, to surrender a part of the estate thus conveyed on the happening of a certain event. It was held that this latter clause did not authorize A. to hold until the happening of that event, and that B. was entitled to immediate possession.

APPEAL from the Circuit Court of St. Louis county.

TOMPKINS, J., delivered the opinion of the Court.

Grimsley brought his action of ejectment against White in the Circuit Court of St. Louis county, where judgment being given for White, the defendant, Grimsley took his appeal to this Court.

Grimsley and White, it appears from the facts preserved in the bill of exception, were joint purchasers of a lot in the city of St. Louis, bounded on the east by Church or Second street, and on the south by North C street. This lot, extending fifty feet by estimation on Church street, by one hundred and twenty on North C street, at right angles with Church street, was divided betwixt them by deed of partition, executed by each party, containing the usual covenants. Each party took an estate in fee simple in his share. Grimsley's portion was bounded by North C street on the south, and extended 20 2-100 feet along the Second or Church street to White's corner. At the close of the deed of partition, and after each had conveyed to the other an estate in fee in his respective portion, comes another provision in the words following, viz: "It is further covenanted, understood and agreed upon by the parties to these presents, that whereas in the within mentioned allotment or partition, there are three feet and 52-100 of a foot of ground appertaining to Thornton Grimsley, and on which the south end of Joseph White's house is now erected, and whereas the said Thornton Grimsley has a part of his house erected on North C street; now if at any time hereafter, or as soon hereafter as the corporation of the city of St. Louis, or any other competent authority, shall demand or require from the said Thornton Grimsley the said quantity which he enjoys on North C street,

(258) then on demand of the said Thornton Grimsley, his heirs or assigns, to the said Joseph White, his heirs or assigns, he the said Joseph White, his heirs or assigns, shall without delay abandon or remove from the said three feet and 52-100 of a foot of ground, running, &c., (describing the line between White and Grimsley, to be possessed and enjoyed by the said Thornton Grimsley, his heirs and and assigns as herein intended in the part allotted to him by these presents. In witness, &c.

Evidence was given of an ordinance of the corporation authorizing the paving of North C street; and Grimsley was required to remove his fence that stood on the street, but his house remained uninterrupted.

The Circuit Court, on motion of the defendant, instructed the jury,

Grimsley v. White.

First. That the covenants in the deed read in evidence amount to a license to White to continue in possession until a demand is made upon Grimsley in the terms of the deed by the corporation of the city or by some competent authority.

Second. That the demand made of Grimsley to remove his fence off the street, is not such a demand as will entitle him to his action. These instructions were expected to and are now assigned for error. The points arising are,

First. Does the deed of partition authorize White to hold possession till demand made of Grimsley?

Second. Has such demand been made?

First. It is contended for White that this is an express covenant of Grimsley that White shall keep possession till the demand is made, and a case in 12 *East.* 179 is cited.

"In that case the parties covenanted together that one should keep the other's property for a certain time, and it was held to be a covenant that he should not keep it longer, so that an action of covenant could be maintained for the non-delivery at the end of the time allowed." In the same manner it may be said, that if A. hire his horse to B. for one month, there is an implied promise that he shall be returned to his owner at the end of that time, and if B. fail to return the horse, A. may have (259) his action of trover or detinue, because B. had no right to retain the horse except under the contract, and so soon as that contract expired, the right of A. to the use of his horse accrued; and then it became the duty of B. to restore it. The covenant in the case cited from *East.* was about the hire of a ship, and certainly the right to use the ship accruing by covenant, the action of covenant will lie to recover it at the expiration of the time for which it was hired. But the case here is, that by one clause in this covenant, White conveys absolutely one half of the lot to Grimsley, and covenants for quiet enjoyment; then Grimsley adds a covenant that White shall hold the other half without disturbance: afterwards comes the covenant of White that he will surrender a certain part of the above premises before conveyed absolutely in fee simple and with a covenant for quiet enjoyment. And it is contended, that as it was the duty of the man who covenanted to pay so much for the hire of a ship for a given time, to restore the ship at the end of that time, so it is the duty of Grimsley to allow White to hold the land till the happening of the event on which White had covenanted to give possession. We cannot view it in that light. All the right of White had, in the first clause, passed to Grimsley, with a covenant for quiet enjoyment; and the clause afterwards added, by which he covenants to give possession at a future day, cannot stand with the first clause, by which present possession was given, and must therefore be rejected. See *Shepp. Touchatone*, p. 88. To allow this clause to stand, we must, as was well contended by the other side, also imply for Grimsley that he will allow White to hold his land till the happening of the event in consideration, that White will then give up what he had before given up, thus by implication extending Grimsley's covenant beyond his former express covenant. The case being disposed of by the decision of the first point, it becomes unnecessary to decide the second. The judgment of the Circuit Court is reversed, and the cause remanded.

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(260) CHOUTEAU, SMITH AND WIFE, CHOUTEAU AND CHOUTEAU, T. PAUL,
ET AL.

1. An agreement between a husband (without consent of his wife) and other heirs, to bring into *hotch pot* all they had respectively received by way of advancement in the life time of their testator, will not divest the wife of her estate in the land.
2. An agreement purporting to be made by A., which is signed by A., who styles himself the agent of B., in the agreement of A. himself, and not the agreement of B.
3. Where a will requires an appraisement of the land, and directs that a partition among the children shall be made according to that appraisement, without going into a Court of law, the children will be entitled to a partition, notwithstanding the executor has failed to cause a partition to be made as required by the will.
4. Where one half of the estate is devised to the widow, and the other half to the children of the testator, the widow may join with a portion of the children against the others, in a petition for a partition, to obtain an allowance of her share.

ERROR to St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

Therese Chouteau, the widow of Col. Auguste Chouteau, Tho. F. Smith and his wife, daughter of Auguste Chouteau, Henry and Edward, sons of said Chouteau, commenced a proceeding in the Circuit Court for a partition of certain lands mentioned in the petition, against Gabriel Paul, Rene Paul and their wives, the daughters of said A. Chouteau, and also against Auguste A. Chouteau and Gabriel Chouteau, sons of the deceased.

The deceased made a will by which he recognized a marriage contract between him and his wife, whereby the widow is entitled to one half of the real estate sought to be divided by the partition. By the 6th article of the will, the testator devised all the residue of his real estate to his seven children, to be equally divided between them. The will also directs that there shall be an inventory and appraisement of all the effects of the testator.

The defendants appeared and filed an answer, which alleges that after the demise of the testator, the widow, Gabriel Paul and Rene Paul for themselves and their wives, Tho. F. Smith for himself and wife, and Auguste A. Chouteau by his agent, (261) and all the others for themselves, entered into an agreement to bring all they had respectively received by way of advancement in the life time of the testator, into *hotch pot*. The answer sets out the respective sums each had received, as recited by the agreement. The agreement fixes the proportion of each devisee at \$7,000, and then contains a farther agreement, that each will abide by a final division and distribution on the basis of this agreement. This agreement is set up as a bar to the partition which seeks to give the widow one half of the real estate, and also to give each of the other children one seventh of the remainder, without any regard to the several sums advanced to each in the life time of the testator. These sums were unequal, some having received between 4 and \$5,000, and some not more than half that

Chouteau and Smith v. Paul.

amount. Auguste A. Chouteau received the whole \$7,000. By the agreement, he was to have nothing till each of the others should have received an amount equal to his.

The answer farther insists that the petition sought is contrary to the will which directs an appraisement and division accordingly. This answer was demurred to. The demurser was sustained, and judgment for the defendants.

The first question presented by the answer is, whether the agreement to bring things into *hatch pot* is a bar to the claim set up by the petitioners. It is argued by Mr. Geyer, for the defendants, that this agreement is an estoppel to the claim set up.

It is answered by Mr. Allen, for the petitioners, that this agreement cannot operate as an estoppel,

First. Because it is not under seal; and

Second. There appears to be no consideration for the agreement.

Third. That G. and R. Paul and T. F. Smith could not dispose of the inheritance of their wives by this instrument so as to make their estates or shares more or less, the wives not having joined in the agreement. We are of opinion that these objections are all and each of them good in law. The wife of G. Paul is already dead as appears by the record. The estate which the wife had, has descended to her heirs. (262) They are made parties and now claim their mother's share, whatever it may be. This agreement on the part of the husband without the wife, did not divest her of the estate in the land. How then can the Court decree a partition according to that agreement. The same reasons are applicable to the rights of the two other named women.

Furthermore, this agreement is totally void as it now stands before this Court as to Auguste A. Chouteau. The agreement purports to be made by Bernard Pratte, who styles himself the agent of Chouteau, and is signed by B. Pratte. This is therefore the agreement of B. Pratte and not of A. A. Chouteau.

With regard to the widow, she has not by the agreement brought any thing into *hatch pot*. Her interest or share is nowhere referred to by the agreement. She signed the agreement with the others, but no part of the agreement can be referred to her, except that part which says the advancements to the children in the life time of the testator shall be brought into division. This is an agreement on her part that each of the children shall receive shares according to the basis of the *hatch pot* principle. If this agreement is binding on her at all, she will be answerable to the others for a breach of the covenant or agreement, if any of the parties who can break the agreement should do so.

The next objection raised by the answer is, that the will requires an appraisement of the land, and directs that a partition shall be made among the children according to the appraisement, without going into a Court of law at all. It is alledged that this appraisement never has been made, and until it is made no partition can take place. The language of the will is, that as to the residue of the estate, after providing for the widow, I give it to my children to be equally divided among them. Then the will proceeds immediately and says, I will and order that there shall be made an inventory with appraisement of all my properties, lands, &c., to be distributed and divided as aforesaid mentioned. The appraisement and inventory are things which (263) the law requires in all cases, and if the executor should fail to cause them to be made, we cannot conceive how that could prevent the devisees from obtaining a partition among themselves of the real estate devised. Their title to the legacy is as

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good in law, without the appraisement, as it would be with it. The appraisement would give no additional light as to the share each would be entitled to. When the partition is made, each will take his share, subject to the payment of debts properly presented within the lawful time allowed by law. But it is argued, the words in the will, *to-wit*: to be distributed and divided as before mentioned, mean that the executor, and not the Court, shall make the partition, and that according to the appraisement. We are of opinion these words refer to the quantity each shall receive, without any regard to the means to be used to ascertain that quantity. The will fixes the relative portions of each legatee, as well as the right of the widow, and leaves the means to be employed to the law of the land.

The next objection to the petition is, that the widow, who claims half the land mentioned in it, cannot join with a portion of the legatees against others to have her share allowed. Whether the widow can be so joined with the others, will depend on the statute of this State relating to this matter. By the first section of the act to provide for the partition of lands, (see *R. Code* 609,) it is provided, "that where any lands, tenements or hereditaments shall be held in joint tenancy, tenancy in common or co-parcenary, it shall be lawful for any one or more of the parties interested therein to present a petition to the Court, describing the lands, &c., and setting forth the rights and titles of the parties therein, and praying the same may be divided by commissioners, the Court shall proceed to cause a partition to be made, &c. The second section provides that after all the issues are determined, the Court shall ascertain and determine the respective rights of the said parties in such lands, &c., and give judgment that partition thereof be made between them according thereto, or between such (264) of them as have any right therein." It may be true that with regard to the parties petitioning and the parties defendants, they may not be all in relation to each other either as co-parceners, tenants in common or joint tenants. Yet that, in our opinion, makes no difference. We think the law makers intended to embrace every possible case, other than that of severalty. The law directs the Court to ascertain the respective rights of each, clearly contemplating that there might be a difference with regard to the quantity or duration of interests. But we are of opinion that the case is within the words of the law.

The widow in this case is entitled to half the land mentioned in the petition, and all the children are entitled to the other half. Now with regard to the widow, they are to be considered as one tenant only, and they, as regards her relation to them, are tenants in common with her; but as regards the relation they bear to each other under the will, they are joint tenants, and if they take as heirs, they are co-parceners. Upon the whole matter we are unable to see any good reason why the partition cannot as well be made and as complete justice done under this petition as could be under any other that could be framed.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings.

DAGGETT & PRICE v. SHAW.

A carrier is responsible for all losses, except such as are inevitable, or such as arise from the act of God, or the enemies of his country, or such as are excepted in his contract. (Note a.)

ON ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of assumpsit commenced by Shaw, the defendant in error, against the plaintiffs in error, in the St. Louis Circuit Court, to recover of them (being the owners of the steamboat St. Louis) the value of three crates of earthenware shipped (265) on board the St. Louis in good condition, &c., to be transported from New Orleans to the city of St. Louis, and there delivered in like good order and condition to the defendant in error, the dangers of the seas only excepted, &c. The material facts, as preserved in the bill of exceptions, are, "that the three crates of earthenware complained of were lost from on board the steamboat St. Louis, in the Mississippi river, on her passage from New Orleans to St. Louis: that at the time the crates were lost, they were not stowed in the hold of said steamboat, but were placed upon the lower guard under cover of the upper guard, and from that position were struck off into the river by another boat running against the St. Louis in the night: that goods stowed on the guard were more exposed to accidents than when stowed in the hold of the boat: that the loss was sustained by the running of the steamboat Courtland upon the steamboat St. Louis, in a dark, smoky night: that at the time of the injury the steamboat St. Louis was steered by a pilot as good as any upon the river; that she was under way hugging the bar, which lay on the right hand, and running by soundings in about two fathom water, and as near the bar as was thought safe; that from this position a light was seen across the head of the bar, which at first was not believed by the pilot of the St. Louis to be the light of another boat; that the Courtland turned the head of the bar, when her lights disappeared, and were not seen again from the St. Louis until the boats had approached so near each other as to render it impossible to avoid a contact; that the Courtland, as if afraid of running aground, turned out obliquely from the bar and struck the St. Louis with her bowsprit and cut-water, so as to carry away the after part of the wheelhouse and after guard, with the three crates and sundry stores belonging to the boat, which were stowed together on the guard, &c., &c.; that by the uniform course of navigation on the Mississippi, steamboats ascending hug the shore, and those descending keep the stream; that in transporting goods in steamboats on the western waters, it is the (266) universal practice to stow above hatches upon the decks and guards, such goods as are not subject to be easily damaged by the weather, particularly crates and casks of earthenware, &c., &c. Upon this state of facts the plaintiff moved the Court to instruct the jury, that the loss of the crates did not occur by one of the dangers of the seas within the exception in the bill of lading; which instruction was given. The defendants then moved the Court to instruct the jury, that if they find

Daggett & Price v. Shaw.

from the evidence that the master and navigators of the defendants' boat used reasonable care and diligence with the three crates, and that the same were lost without the negligence or fault of the defendants or their servants, the defendants are not liable in this action.

Second. That the fact that the three crates were stowed upon the guards of the boat, does not make the defendants liable in this action, if they would not have been liable in case the crates had been stowed in the hold of the boat, &c.; which instructions prayed for by the defendants were refused; to the giving and refusing of which said several instructions the defendants excepted. Thereupon the plaintiff in the Circuit Court had verdict and judgment, to reverse which the present writ of error is prosecuted; and the defendants below, who are plaintiffs here, assign for error the giving the instruction asked by the plaintiff, and the refusal of the Court to give the instructions asked by the defendants. Mr. Allen, for the plaintiffs in error, insists that the bill of lading is a contract of bailment, in the execution of which ordinary care and diligence only on the part of the bailee can be required. The authorities cited do not bear him out. A carrier, it is true, may be regarded as a bailee for hire; but he will be held in the light of an insurer, responsible for all losses but those that are deemed inevitable, or arising from the act of God, and of the King's enemies—see 1 T. R. 27, and 5 T. R. 389—unless he be protected by the terms of his contract. The only exception in this case is, loss arising from the danger of the seas. And the Circuit Court decided very correctly, that the loss of the crates in this case, did not come within the exception. The objection that it was a question (267) for the determination of the jury, and not for the decision of the Court, is not well raised. The contrary thereof is the law. Regarding it as a bailment for hire, what should be deemed reasonable care and diligence would depend upon the circumstances to be ascertained by a jury; but when ascertained, to be determined by the Court. The instructions asked for by the defendants were therefore wrong, and correctly refused by the Circuit Court; the first presenting a question of law in the abstract, proper for the Court, and the second a state of facts, from which it was the duty of the Court to decide the law in the way it was decided.

The judgment of the Circuit Court is therefore affirmed with costs.

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| (a.) See Ducker <i>v.</i> Barnett et al., | 5 Mo. R., 97. |
| Pomeroy <i>v.</i> Donaldson, | 5 " " 36. |
| Erskine & Gore <i>v.</i> S. B. Thames, | 6 " " 371. |

BATES v. SIMMONS.

A receipt, acknowledging the receipt of a keel boat in good order, and promising to return the same in a reasonable time in like good order, covers all defects in the boat except secret defects.

ON A WRIT OF ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of assumpsit on a contract of hire, commenced by Simmons, the defendant in error, against Bates, the plaintiff in error, in the St. Louis Circuit Court. Simmons had judgment below, to reverse which Bates now prosecutes his writ of error in this Court. The evidence, as preserved in the bill of exceptions, is in substance, a receipt from Bates to Simmons for a keel in good order, &c., which was hired for a trip to St. Peters, to be returned in like good order within a reasonable time, and for which he was to pay Simmons two hundred dollars. "The defendant proved that the keel boat was hired for the use of the steamboat Galena, to transport her cargo over the rapids of the Mississippi river, the river being too low for the steamboat to pass; that the steamboat Galena took the keel in tow up (268) the rapids, and there, when the goods were about to be shipped on board the keel, it was discovered that the same was leaky and wholly unfit for the voyage; that the Galena towed the same back to St. Louis, where it was delivered to plaintiff, and procured another keel and towed it up to the rapids to take the cargo intended for the Little Davy, (the keel hired of Simmons); that as far as a witness knew, the keel (Little Davy) was not injured after it left St. Louis; that the defendant was master of the steamboat Galena, and claimed two-sevenths thereof." Upon this evidence the cause was submitted to the Court, neither party requiring a jury, when the defendant moved the Court to decide that if, from the testimony, it appeared that the keel boat, Little Davy, was leaky and unfit for the use for which she was hired, and that the plaintiff knew for what she was hired; and if it did not appear that she was injured after she left St. Louis, and was not used by the defendant, the plaintiff could not recover; which decision the Court refused to give, and held that on the receipt read in evidence by the plaintiff, he could recover, and that it covered all defects except secret defects; to which the defendant excepted, and which refusal and decision he now assigns for error.

There was no foundation for the instruction or decision prayed for by the defendant. No attempt was made to prove that the plaintiff either knew for what particular service the keel was intended, or that she was unfit for service. The defendant's receipt showed that it was intended for a trip to the St. Peters, and that it was in good order when received. That a particular witness who was examined *did not know* that the keel received any injury after it left St. Louis, afforded no shadow of reason for presuming against the receipt, that the keel was leaky and unfit for service at the time it was hired.

The judgment of the Circuit Court is therefore affirmed with costs.

Zumwalt v. Zumwalt.

M'GIRK, C. J., dissenting.

I dissent from this opinion on the ground that there was a sufficient state of facts on the record to justify the defendant to ask the instruction he did ask, and that the Court should have given the instruction required.

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ZUMWALT v. ZUMWALT.

Any person who has an interest in the matter, and feels himself aggrieved, may appeal; but if his interest be not direct, it must be made apparent on the record; and if he does not make it clear that he is interested, but leaves it doubtful, the Court will decide against him.

APPEAL from the Circuit Court of St. Charles county.

M'GIRK, C. J., delivered the opinion of the Court.

John and Adam Zumwalt were administrators of the effects, &c., of their father. On a final settlement before the County Court of St. Charles county, Jacob Zumwalt presented his petition to the Court, alledging that he had received no advancement in the lifetime of his father, and that the other children of the deceased had been advanced to about the amount of \$1,000, and praying that the remaining funds in the hands of the administrator might be paid over to him, which would still leave him with a less portion than the other children had received. The Court heard the testimony and ordered that the administrators pay the balance in their hands to Jacob. A bill of exceptions was taken to the opinion of the Court. Thereupon John, one of the administrators, and one George Zumwalt appealed to the Circuit Court. When the cause came there, various proceedings were had in regard to said appeal. Among other things, Jacob Zumwalt moved the Court to dismiss the appeal because both the administrators had not appealed. And, secondly, because George Zumwalt, who was one of the appellants, does not appear by the record to have any interest in the judgment or decree of the Court. The Circuit Court dismissed the appeal, from which dismissal the cause is brought here by appeal. The only point (270) necessary to be considered is, whether the Circuit Court did right in dismissing the appeal.

The only evidence on the record conducing to show that George Zumwalt was in any wise interested in the matter is, that Jacob Zumwalt sets forth in his petition the names of the children of the intestate, and among them George is named. Taking it to be true that there is a distributee named George Zumwalt, yet the man

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appealing may or may not be that man. The record should show that George, the appellant, had an interest in the thing litigated. This could be done by his petition or motion to the Court stating and showing his interest by proof, if denied or required. Then this being entered of record, his right to appeal would be clear. The law is, that any person who has an interest in the matter, and feeling himself aggrieved, may appeal. The fact that an appellant is interested, if he is not a direct party, must be made apparent on the record; and if he does not make it clear that he is interested, but leaves the matter doubtful, the Court must decide against him; for the rule is, that if he whose duty it is to make a matter clear, leaves it doubtful, the Court will solve that doubt against him.

The judgment of the Circuit Court is affirmed with costs.

JULIA (A WOMAN OF COLOR) v. MCKINNEY.

1. Where a person does not intend introducing slavery into the State of Illinois, yet does in fact introduce it, he will forfeit his slave unless he can show some reasonable and necessary cause for introducing the slavery.
2. Where a slave was settled in the State of Illinois, but with an intent on the part of the owner to be removed at some future day, it was held that hiring said slave to a person to labor for one or two days, and receiving the pay for the hire, entitled the slave to her freedom, under the second section of the sixth article of the Constitution of Illinois. (Note a.)

ERROR to the Circuit Court of St. Louis county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action commenced under the statute for freedom. Verdict and judgment (271) against Julia, the plaintiff. The bill of exceptions shows the following case: that McKinney, the defendant, bought the plaintiff as a slave from one Lucinda, Carrington; that in the year 1829, Mrs. Carrington lived in the State of Kentucky; that she then had in her possession the plaintiff, Julia, as a slave; that she then and there determined and declared her intention to be, to remove and take with her Julia to the State of Illinois; that a witness in this cause applied to her to buy Julia, telling Mrs. Carrington that she could not hold Julia in Illinois as a slave; that if she took her there she would be free. Mrs. Carrington refused to sell Julia; said she would not keep Julia in Illinois, but intended to hire her out in Missouri. Accordingly Mrs. C. moved to Illinois, brought with her said Julia, arrived in Pike county, Ill., about 27th or 28th of October, settled herself there,

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purchased land, &c. She kept Julia there with her till about the 1st of December the same year, exercising the ordinary acts of ownership and dominion over her, which are usually exercised by masters over their slaves: that in the mean time Mrs. Carrington hired Julia about two days to some person to work, which work was performed, and that she received pay therefor: that about the 1st of December in the same year, Mrs. Carrington sent Julia to Louisiana, Missouri, a distance of about 30 miles and hired her out: that Julia lived in Missouri some time, became sick and that Mrs. C. then sent for Julia, took her home into Pike county, in Ill., where she was kept till she recovered her health: that Mrs. C. then took or sent Julia to St. Louis and sold her to S. McKinney, the defendant.

Several instructions were asked by the defendant, which were given and excepted to. The plaintiff also moved for a new trial, which was refused.

The first instruction given by the Court is, that if the jury believe from the evidence that the plaintiff, Julia, was taken into the State of Illinois by her owner without any intention on the part of such owner to make that State the residence of Julia, (272) that the plaintiff is not entitled to recover in this action. We will consider this instruction before we notice the others. The plaintiff's claim to freedom is based on the 6th article of the Constitution of the State of Illinois, which declares that neither slavery nor involuntary servitude shall hereafter be introduced into this State otherwise than for the punishment of crimes whereof the party shall have been duly convicted. The article then goes on to make some provision with regard to hiring persons bound to service in other States, and concludes by saying, any violation of this article shall effect the emancipation of such person from his obligation to service. We see by this Constitution that the very introduction of slavery, works an emancipation of the slave, and it is argued that if we give this Constitution a literal construction, no one can travel through that State with his slaves, without emancipating them. It is true that a literal construction would lead directly to this result. Every law should be adjudicated on with a view to the end and object thereof. The object of the Constitution of Illinois was not to prevent persons owning slaves in Kentucky, from passing through Illinois with their slave property to Missouri, but to prevent the relation of master and slave from existing in that State by an inhabitant and resident thereof. We are furthermore of opinion that all persons who are citizens of any of the States, have a right by the Constitution of the United States to pass through Illinois with any sort of property that they may own in the State where they migrate from. The 2d section of the 4th article of the Constitution of the United States says, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. We are of opinion that it is the undoubted right of every citizen of the United States to pass freely through every other State with his property of every description, including negro slaves, without being in any way subject to forfeit his property for having done so, provided he does not subject his property by a residence, to the action of the laws of the State in which he may so reside. Another view of the subject is, that out of the general words of the Illi- (273) nois Constitution, of necessity exceptions must be raised. Though it is true, that slavery shall not be introduced into that State under penalty of forfeiting the property, yet it can be so introduced so far as to permit persons passing through the State, as emigrants or mere travelers, to carry with them their slave property and to retain in them their right to such property, while they retain the character of emigrants or travelers, otherwise there could be no emigration through the State with

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slave property, which is a thing it cannot reasonably be supposed the Constitution of Illinois intended to forbid. How long the character of emigrant or traveler through the State may last, cannot by any general rule be determined; but it seems that reason does require it should last so long as might be necessary, according to the common modes of traveling, to accomplish a transit through the State. If any accident should happen to the emigrant which in ordinary cases would make it reasonable and prudent for him to suspend his journey for a short time, we think he might do so without incurring a forfeiture, if he resumed his journey as soon as he safely could. Something more than the mere convenience or ease of the emigrant ought to intervene to save him from a forfeiture. Something of the nature of necessity should exist before he would or ought to be exempt from the forfeiture. If swollen streams of water which could not be crossed without danger should intervene, serious sickness of the family, broken wagons, and the like should exist, there would be good cause of delay so long as they exist, if the journey is resumed as soon as these impediments are removed, provided also due diligence is used to remove them. In the case before us the owner of the slave was not an emigrant, but went into Illinois with an avowed view to make that State her home. She took up her residence there, with her slave in her possession, and kept the slave there for upwards of one month, and treated the slave in all respects as slaves are treated in States where slavery is allowed. These acts of the owner surely amounted to the introduction of slavery in Illinois. Unless, therefore, the case can be brought within some reasonable and equitable exception, to be (274) engrafted on the Constitution of Illinois, the plaintiff will be entitled to exact the forfeiture of emancipation. In this case we see nothing in the nature of accident to prevent the owner from taking the plaintiff to Missouri immediately. The excuse set up is, that the owner was a widow and might not have had the means of immediate transportation of the slave to Missouri; that she was a new comer in the country and might be poor and therefore unable to do it; that some reasonable time ought to be allowed to her to provide a residence for herself and family, and that one month in this case is not too much. We are of opinion that the excuse to raise an exception, must be something more than the mere convenience or inconvenience of the owner. But the instruction assumes that if the owner did not intend to make Illinois the residence of the slave, then there is no violation of the Constitution. Is it true that if a person says he does not intend to do an act and yet does it, that the act is not done? The Constitution of Illinois does not regard the intention to introduce or not to introduce slavery, but prohibits the act. If a person says he does not intend to introduce slavery, yet if he does introduce it *de facto*, can the innocent intent save him from the forfeiture? We think it cannot, unless he can also show that his case raises a reasonable and necessary exception. But in this case the evidence is, that the owner did intend and in fact did introduce slavery in Illinois, but declared that she did not intend to continue it for any length of time; but that she would take the slave to Missouri and there hire her out. But suppose the owner did not intend to make Illinois the place of the slave's residence permanently, but only for one month; yet slavery is introduced and continued for the mere convenience of the owner without any circumstances which raise a just or even a reasonable exception in her favor. The case of *Winney v. Whiteside*, decided by this Court, has been cited to prove that what the owner intended, is to be a criterion to govern the question of freedom or slavery. That was a case where the owner of a slave removed to the North-Western Territory, now

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(275) Illinois, with the slave, with the intent to make that country his residence, and he did in fact make it his residence, as well as that of his slave also. The ordinance of Congress for the government of that Territory, declares there shall be neither slavery nor involuntary servitude in the Territory. This Court decided that if the owner went there with his slave, with intent to make that place his permanent residence, and the residence of his slave, *and did in fact do so*, that the slave was by such residence free; but the Court did not decide that the slave was free by reason of the intent being declared.

The second instruction given assumes that the slave is not entitled to freedom, because she was taken to Illinois and remained there till she was cured of sickness. We will give no opinion on this point, as we consider the case fully decided on the first and third instructions.

The third instruction is, that the plaintiff is not entitled to recover under the 2d section of the 6th article of the Constitution of Illinois. The section declares "that no person bound to labor in any other State, shall be hired to labor in this State except within the tract reserved for the saltworks, &c." It then concludes as before stated, that any violation of this article shall effect the emancipation of such person from his obligation to service. Whether this instruction intends to decide that the facts testified are true or untrue, or only decides that the proof and case made does not in law entitle the party to recover, we do not exactly know. It seems however that the instruction is wrong, because it decides both the fact and the law. But if the instruction only assumes to decide the law, yet it is wrong. The evidence is, that after the slave was fairly introduced into Illinois and settled for the time being, but with an intent on the part of the owner to remove the slave at some future time to Missouri, the owner did hire the slave to a person to labor for one or two days, and received the pay for the hire. The Court instructed the jury that this hiring is not a hiring within the prohibition above cited. We suppose the Circuit Court thought the degree or quantity too small. We believe the object of this provision was to prevent slave labor from becoming a substitute for white or free labor throughout the State. The Constitution makers have therefore prohibited the thing in every possible degree. Here was a hiring of a person bound to labor in Kentucky, whilst in Kentucky, brought into Illinois, (not to reside there say if you will,) and hired to labor for one or two days by the owner. What difference can it make if the hiring had been for one hundred days? We can see none, except in the degree or quantity of time: with regard to the motion for a new trial, we think the Court erred in refusing it. The reasons assigned for the new trial are, that the verdict is against law and evidence. The evidence is sufficient to bring the case within the operation of the Constitution.

The judgment of the Circuit Court is reversed, the cause is remanded for a new trial.

WASH, J. dissenting.

I think the Circuit Court erred in giving the third instruction, assuming to decide the facts as well as the law of the case, and therefore concur in reversing the judgment. The first and second instructions were, in my opinion, properly given. The claim to freedom under the provisions of the Illinois Constitution must be founded either upon a *residence* of the slave, or a *hiring of the slave to labor*. What shall

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amount to a residence or a hiring against the provisions of the Constitution must depend upon the facts and circumstances of each particular case. A *bare removal* into the State can form no ground on which to set up the claim; especially when it is shown that the removal is not made with a view to residence. The intention of the owner as previously declared, is the only evidence that can exist in such a case. To hold then that it matters not whether the owner *intends* to make Illinois the residence of his slave or not, is to exclude (as it appears to me) the only evidence that can exist where the claim is founded on a bare removal to the State. The intention with which a thing is done gives color and character to almost every transaction. (277) The emigrant who journeying to Missouri, unfortunately gets his leg broken, or being detained by serious sickness, keeps his slaves with him in Illinois for days or months until he recovers sufficiently to resume his journey, will not thereby forfeit his property in his slaves, and why? Because his residence for a week, a month or a winter, was *unintentional* and *accidental*, and the slaves were detained there without any intention on his part of making it the place of their residence. So the owner of a slave who in passing through Illinois, permits the slave at night to brush his landlord's boots, or make his fire, or shuck his corn for such reward as the landlord may think proper to give, would not surely be adjudged to forfeit his slave under the provisions of the second section of the sixth article of the Constitution, and why? Because the owner did not *intend* in taking his slave to Illinois, or in journeying through or sojourning in the State, to hire him to labor. For it will not be contended that the master did not intend that the slave should *perform* the particular service and receive therefor the stipulated reward: that is, should *brush* the boots or make the fire, and receive the 12 1-2 cents or the half pint of *whiskey*. Thus it seems to me that the facts and circumstances in every case are to be weighed with the intention of the parties acting therein and to be charged therefor. The introduction of slavery or the attempt to introduce it, is regarded in some sort as a criminal act, and is punished by a forfeiture of the property introduced. We must then look to the intention of the party introducing the slave, to determine the degree of guilt and see if the spirit of the Constitution has been violated, since it is clear its letter cannot be enforced.

Any other doctrine will convert the kind and tender nursing by the master of his sick and helpless slave into a *sort of crime*.

(a.) See Rachael v. Walker, 4 Mo. R., p. 352; Wilson v. Melvin, 4 Mo. R., p. 596.

3	278
104	628
3	278
108	157
3	278
71a	28
3	278
142	335
144	557
3	278
160	83

(278)

THE STATE v. MERRY.

1. From the third section of the fifth article of the Constitution of this State, the Supreme Court derives jurisdiction in case of informations in the nature of a *quo warranto*.
2. The proviso to the 9th section of the act to incorporate the inhabitants of the town of St. Louis, which declares "that no person shall be eligible to the office of Mayor who may at the time of his election hold any office of honor, trust or profit under the United States," is not repealed by the act supplementary to the aforesaid act.

INFORMATION in the nature of a *quo warranto*.

TOMPKINS, J., delivered the opinion of the Court.

The information upon which the proceedings in this case are founded, sets out that on the first Monday in April last, Samuel Merry, the defendant in this case, was elected Mayor of the city of St. Louis: and that said Samuel Merry before and at the time of said election held an office of profit under the United States, and was commissioned by the President of the United States; and that after such election the defendant claimed to exercise and did exercise the powers and duties of Mayor of said city of St. Louis. The plea of the defendant admits the facts charged. The counsel for the defendant contend,

First. That this Court have no jurisdiction of the cause.

Second. But if this Court have jurisdiction of the cause, they then contend that Merry is rightfully elected.

First. This Court conceives that jurisdiction of this cause is given to it by the section of the 5th article of the Constitution of this State, which gives a general superintending control over all inferior Courts of law, and the power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, and other original remedial writs, and to hear and determine the same.

The Legislature has not prescribed any mode of proceeding in a cause like the present; but in the absence of such regulations this Court will proceed to discharge its duties by a course conformable to the common law usage.

Second. To maintain this point, viz: that the defendant is eligible notwithstanding (279) he holds an office of profit under the United States, his counsel rely on the first section of "An Act supplementary to an act entitled an act to incorporate the inhabitants of the town of St. Louis," viz: "that the Mayor of the city shall be at least thirty years of age, a citizen of the United States, shall have resided within the city for at least two years preceding his election and be otherwise qualified as in the case of Aldermen." And they contend that the 9th section of the act to which the act is a supplement, is repealed. The 9th section of the act above alluded to is in the words following, to-wit: "that the Mayor shall be at least thirty years old, a citizen of the United States, shall have resided within the city for at least two years next preceding his election, and be otherwise qualified as in the case of Aldermen and provided that no person shall be eligible to the office of Mayor who may at the

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time of his election, hold any office of honor, trust or profit under this State, or the United States. The first section of the supplementary act enumerates all the qualifications required to make one eligible to the office of Mayor, that are found in the ninth section of the first act, except that contained in the proviso, viz: that no person shall be eligible to the office of Mayor who at the time of his election may hold any office of honor, trust or profit under this State or the United States. It may here be observed too, that the omission of the word "next" in the first section of the amendatory act seems to make a difference as to the time of residence, viz: that such residence need not now necessarily be next preceding the election. On the part of the defendant it is contended that,

First. The proviso of the 9th section of the original act is repugnant to the provisions of the first section of the amendatory act.

Second. That the Legislature having in the amendatory act taken up the subject of the qualifications required to make one eligible to the office of Mayor, may be supposed to have dispensed with all other than the qualifications enumerated in the said first section of the amendatory act, which is the last expression of the legislative will.

To the first it may be answered that the proviso to the 9th section of the first act is (280) no more repugnant to the provisions of the first section of the amendatory act than it was to the ninth section, before a part thereof was impliedly repealed by the enactment of the first section of the amending act, for they are both substantially the same.

Second. This point might perhaps have been more successfully urged had it not been expressly provided in the tenth section of the amendatory act, "that all such parts of the act to which this is a supplement as are contrary to or inconsistent with the provisions of this act, be and the same are hereby repealed."

It seems clear from this expression of the legislative will, that such parts of the act to which this is a supplement, as are not contrary to or inconsistent with the provisions of this act, shall be still in full force and effect. In the case of *Goodenow v. Battick*, the Court held that though the Legislature, when revising laws, had a particular statute before it, yet if a particular section of such statute did not appear to have been the object of revision, such section could not be considered as repealed: thus intimating that had that section been the object of revision, it would have been considered by the Court as repealed. See 7 *Massachusetts Rep.* 143, *Goodenow v. Battick*. However willing we might be to yield to the authority of that case, we feel constrained by the strong and plain intimation of the will of our Legislature as expressed in the tenth section of the act last above mentioned, to construe our statute otherwise. As above mentioned, the proviso to the 9th section of the first act is not contrary to or inconsistent with the provisions of the act supplementary to the act to incorporate the inhabitants of the town of St. Louis, but as much in aid of such section as it was in aid of the said ninth section of the original act; and not being contrary to or inconsistent with those provisions, we are constrained to think that it is still in full force and unrepealed. The case of *Caruthers* cited by the defendant from 9 *East.* seems rather to make against him.

(281) The statute 13 *Geo. II*, ch. 28, sec. 5, enacts that no harpooner, line manager, boat steerer or seaman who shall be in or belong to any vessel in the Greenland trade shall be impressed from the said service; and that any such harpooner, &c., or seaman may, when not employed in said trade, sail in the colliery trade, upon giving

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security to the satisfaction of the commissioners that he will proceed in the said vessel to Greenland, &c.

The statute 26 Geo. III, ch. 41, sec. 17, enacts that no harpooner, line manager or boat steerer who shall be in or belonging to any vessel in the Greenland trade, and whose name shall be inserted in a list to be delivered by the owner of such vessel to the collector of the customs, shall be impressed from such service, &c., and that every seaman and common mariner who after the first day of February in any year shall be entered to serve on board of any ship which shall be intended to proceed on the said trade in the following season, and whose name shall be inserted in a list to be delivered as aforesaid, and who shall give security to the satisfaction of the commissioners of the customs to proceed and shall proceed accordingly, shall be privileged, &c., from impressment. It was decided by the Court that the second statute repealed the first and for good reason. The first statute exempted harpooners, line managers, boat steerers or seamen belonging to any vessel in the Greenland fishery trade from impressment. The second statute equally exempted them, but it required that the three first, viz: harpooners, line managers and boat steerers, should insert their names in a list to be delivered by the owner to the commissioners of the customs, in order to entitle them to this exemption, to which by the former act they were entitled from the mere circumstance of belonging to a vessel employed in the Greenland fishery trade. But the seamen were not in the mean time forgotten in the repealing act, although their names were not mentioned in conjunction with the harpooners, line managers and boat steerers. In a subsequent part of the same section they, the seamen employed in such trade, were required not only to insert (as the others were required to do) their names in a list to be delivered by the owner of the vessel to the commissioners of the customs, but they were further required to give security to the satisfaction of the said commissioners to proceed in such trade, and it was for failing to insert his name in the list that Caruthers lost his cause. The last of these acts as certainly repeals the first as two is more than one, as that the less number is contained in the greater.

It being the opinion of this Court that the proviso to the ninth section of the act to incorporate the inhabitants of the town of St. Louis is not repealed by the first section of the act supplementary to that act, it becomes unnecessary to decide another point made in argument by the defendant's counsel, though not appearing in the brief and written argument, viz: that the office of Mayor is not an office under the State. It being our opinion that the third section of the fifth article of the Constitution of this State gives to this Court jurisdiction in causes like the present; and it also being our opinion that the proviso of the 9th section of the act to incorporate the inhabitants of the town of St. Louis (which proviso declares that no person shall be eligible to the office of Mayor who may at the time of his election hold any office of honor, trust or profit under this State or the United States) is not repealed by the act supplementary to the aforesaid act: and the defendant having by his plea admitted that at the time of his election as Mayor of the city of St. Louis he did hold an office of profit under the United States, we are led to the conclusion that the defendant was at the time of his election ineligible to that office, and that said election is void in law; and that judgment of ouster from said office be accordingly entered against him.

M'GIRK and WASH, Judges.

The case cited by counsel for the State from 1 Barnwall and Adolphus referred to in 20 Com. Law Rep. p. 352, seems to be in point. That was a case where, by seve-

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ral charters, the Sheriffs of Norwich were to be chosen by the citizens and commonalty from *among themselves*. A subsequent charter confirming former privileges and (283) regulating the time and mode of electing Sheriffs, omitted the words from *among themselves*. The usage before this confirmatory charter was made, had been to elect the Sheriff from among themselves. Held that the last charter was not meant to vary the qualifications, that the restrictions in the former charter could not be dispensed with. The case also of the King v. Abell, 6 Petersdorff is in point, p. 431.

MITCHELL v. THE STATE.

A writ of error lies in a capital case, but a bill of exceptions will not be allowed.
(Note a.)

IN ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an indictment against Mitchell for murder, verdict of guilty and judgment of death in the Circuit Court, to reverse which judgment, the plaintiff now prosecutes his writ of error in this Court. Mitchell excepted to the judgment of the Circuit Court on several matters arising in the progress of the trial below, tendered his bill of exceptions and had them signed by the Court; and in that way caused the matters of exception to be spread upon the record. In this state of the case a motion has been made by Mr. Allen (Circuit Attorney) to quash the writ of error; and two questions are presented for the consideration of this Court.

First. Will a writ of error lie in a capital case?

Second. Was the prisoner entitled to his bill of exceptions?

The authorities cited (2 Tidd. 1188, 2 Salk. 504, 2 Learned 101) lay down the law clearly as settled and administered in the English Courts. It is undoubted law that in England the writ of error in cases of treason or felony will not lie without the consent of the King. It is then a matter of grace and favor.

(284) It has been held by this Court, however, and may now be taken as the settled law of this land, that here the party will be entitled of right to his writ, in all cases where in England he would have it with or without the consent of the Crown.

It remains now to consider the effect of the writ, and whether the bill of exceptions can be allowed or considered in this case. This question has been most

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elaborately and ably argued by Mr. Bates, of counsel for the prisoner, and by Mr. Allen for the State. It is not proposed to examine the arguments and authorities in detail, but merely to state the principal positions assumed, and our understanding of the law in regard to them. It is insisted that a bill of exceptions is a mere corollary or necessary incident to the writ of error, and that the writ of error being a writ of right in all cases, criminal as well as civil, in order to make it effectual the suitor must be allowed in all cases his bill of exceptions. It is answered that the writ of error removes merely the record proper. That the bill of exceptions is intended to place upon the record some matter that would not appear in the regular progress of the cause. In looking into the record proper, it may be seen if the Inferior Courts have jurisdiction of the subject matter and proceed regularly to judgment. The collateral means to be employed, or steps taken in the cause, are left to the judgment of the Inferior Courts, and cannot be reviewed or examined but upon bills of exception, by which they are placed upon the record, and it may be well intended by the Legislature, that the Appellate Court shall have power to correct such errors only of the Inferior Courts as may appear on the record proper of such Courts. It is then insisted that the statute of *Westminster, 2d XIII Edw. I*, which gives the bill of exceptions, is to be regarded as the law of this land in full force, and that in its terms as well as spirit, it applies as well to criminal as civil cases. To this it is answered that in adopting the common law, and the statutes in aid thereof down to the 4th of James I, the British statutes so adopted must be taken and understood as construed by the British Courts at the time of adoption, and that for five centuries (285) and upwards, it has been uniformly held in those Courts that the statute above cited does not extend to cases of treason or felony. In minor criminal cases, bills of exception have been allowed *ex gratia*. The reason, justice or policy of the construction is not now to be questioned. Such long established principles and precedents are not to be uprooted or disturbed. It is better in such cases to take the law as we find it, and conclude that it is founded in good reason, than to change or attempt to change it merely because we cannot see the reason of it. It is again insisted that this Court is required by the Constitution to exercise a superintending control over the Circuit Court in all cases, which cannot be done without the aid of bills of exception, &c.; and here it may be answered that this Court must employ the means provided by the Legislature, and use such as the Constitution affords, where no means are provided. In legislating on the subject of bills of exception, they confine themselves expressly and carefully to civil cases. Their failure to provide for them in criminal as well as civil cases, whilst they were passing upon the subject, is to be taken as equivalent to an express denial of them. Leaving this Court to exercise its superintending control over the Circuit Court by writ of error merely, not choosing to provide for it all the means that may be necessary in all cases.

(a.) See *Vaughn v. The State*, 4 Mo. R., p. 294.

Decisions of the Supreme Court of Missouri,

FAYETTE DISTRICT, APRIL TERM, 1834.

HOLLIDAY v. COOPER.

Where a writ is made returnable to no term known to the law of the land, but to some other day not the commencement of a term, appearance and pleading will not cure the defect in the writ.

ERROR to the Circuit Court of Howard county.

TOMPKINS, J., delivered the opinion of the Court.

Holliday sued Cooper in the Circuit Court of Howard county, where judgment being given for the defendant, the plaintiff sued out his writ of error to reverse the judgment of that Court.

The facts preserved are as follows: On the 27th day of February, 1833, Holliday caused to be issued a *capias* from the office of the Clerk of the Circuit Court, commanding the Sheriff to take the body of the defendant and have him to answer the plaintiff on the first Monday of July, then next at Fayette. The Circuit Court was by law to be held at Fayette on the fourth Monday of July, instead of the first, when this writ was made returnable. At the regular term, viz: on fourth Monday in July, no business was done; but all the suits were continued over to the 16th day of September. On which day the defendant, who had given bail to the action, appeared and pleaded. He then moved to quash the writ, and the motion being sustained, the Court quashed it accordingly.

The plaintiff in error contends that the writ is only voidable, and as such the defect in it was cured by the appearance of the defendant, and by his filing his plea; and he cites *Williams v. Rogers*, 5 Johnson, 163, and *Bettis v. Logan*, 2d vol. Mo. R. (237) p. 2. The case of *Williams v. Rogers* was one in which the Court allowed

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the return of an execution to be amended, saying that the inaccuracy in the return of the writ rendered it voidable, not void; and it is contended that because our statute requires the declaration to be filed before a writ of summons or *capias ad respondendum* can issue to bring the defendant into Court to answer; therefore such writ is mesne process, and can be amended in any matter. It is very useless to waste time in inquiring whether the writ of summons or *capias* is with us original process in the common law sense.

It is certain that the *capias* issued in this cause was the notice to the defendant to appear and answer to the complaint of the plaintiff, and that it ought to have notified him to appear on the fourth Monday in July, and not on the first. The object of the writ being to notify the defendant of the action and the time and place of holding Court, how can he be less deceived in a misstatement of the time of holding Court by the circumstance of the law requiring the declaration to be filed a few minutes before the writ is issued?

The case of *Bettis v. Logan* also relied on, was an action for a malicious prosecution, commenced by *Logan v. Bettis* in the Circuit Court of Wayne county, thence the venue was changed to the Circuit Court of Cape Girardeau county, and from that county to St. Francois county. In this last county, the report says, the declaration being found mutilated and defaced, leave was given to file another, and the defendant then withdrew his plea before that time, filed and pleaded again to the new declaration filed by the plaintiff. The parties then went to trial; a verdict was found for the plaintiff, and he had judgment.

To reverse this judgment Bettis appealed. In an additional brief furnished to the Court, it was objected that it did not appear on the record how the Circuit Court of Wayne county was legally divested of its jurisdiction, or that the Circuit Court of St. Francois county could legally entertain jurisdiction of the cause. The Court said that although this was not assigned for error, yet it will be noticed. The entry is, James Logan v. Elijah Bettis, change of venue from Wayne county to Cape Gi-(288) rardeau county, and from Cape Girardeau county to this county. Yet the Court held that because he had withdrawn his plea by leave of the Circuit Court of St. Francois county, and filed another plea and gone to trial, thereupon he had admitted the jurisdiction of the Court. Now it was not pretended that Bettis had not been duly summoned to attend the Circuit Court of Wayne county.

He then appeared and pleaded in that Court, we may fairly presume; and he being in Court, the venue was changed, and if he appeared at any Court afterwards to which the cause was sent by changing the venue, then the conclusion was rational and legal, that all the formalities of the law had been complied with, or that he waived any irregularity.

But in the case now before us, the Circuit Court of Howard county had never been possessed of the cause, and the appearance of the defendant could not cure a void writ which was returnable to no term known to the law of the land. We are of opinion that the Circuit Court committed no error, and its judgment is therefore affirmed.

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TOWNSEND v. FINLEY.

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Where a party neglected to make the necessary affidavit before taking an appeal, it is no excuse that he was not aware of the existence of the law at the time of taking the appeal; the act requiring the affidavit having been recently passed, and not yet published. All persons are bound to know the law. (Note a.)

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ON A MOTION FOR A MANDAMUS to the Circuit Court of Saline county.

WASH, J., delivered the opinion of the Court.

On the 5th of April, 1831, Townsend obtained a verdict and judgment against Finley, before a Justice of the Peace. Finley, without making the affidavit required by the 2d section of the act passed on the 18th day of January, 1831, entitled "An act supplementary to an act establishing Justices' Courts," &c., p. 48, prayed an appeal from the judgment of the Justice of the Peace to the Circuit Court, which, upon (289) his entering into recognizance, was granted by the Justice. When the cause was called in the Circuit Court, the counsel for Townsend moved to dismiss the appeal for want of the affidavit, as directed in the act of 1831, above cited, which was done accordingly.

Finley then moved the Court to reinstate the appeal, for reasons disclosed in an affidavit accompanying the notice. Which were in substance that at the time of taking the appeal, the act of Assembly requiring the affidavit had not been promulgated, and that Finley was entirely ignorant of the existence of the act. That the Justice of the Peace was a member of the Legislature by whom the act was passed, and granted the appeal without advising the appellant of the existence of the act, &c. The Circuit Court refused to reinstate the appeal, and Finley has applied to this Court for a mandamus to compel the Circuit Court to do so.

The act of the 18th of Jan., 1831, above cited, was to take effect and be in force from and after the passage thereof. No mode is prescribed in which the laws are to be promulgated. And in this case nothing is shown as to the time when the act in question was published or promulgated.

All persons are bound to know the law, and therefore it would seem improvident and unreasonable for the Legislature to give force and effect to laws by which individuals might be barred of their rights or subjected to losses, before their existence, in the nature of things, could be known, and Courts of Justice would struggle against the hardship of such a case. The present however is not such an one. The fact that the Justice of the Peace before whom the cause was tried, had been a member of the Legislature by whom the act was passed, cannot operate to change the law of the case. It was not his province to advise the appellant in the steps proper to be taken in the prosecution of his cause, even if it could be considered a legal presumption that he knew the law from the fact of having been a member of the Legislature by whom it was enacted. The Circuit Court did right in dismissing the appeal, and the mandamus is therefore refused.

(a.) See Hite v. Lenhart, 7 Mo. R., 22.
Jameson v. Yates, 7 " " 571.

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1. Fraud may be presumed, but not without some evidence on which a presumption may be raised.
2. To constitute a sale fraudulent *in fact*, as against creditors, it must be made with intent, on the part of the vendor, to defraud, delay, or hinder creditors.
3. Where the transaction on the part of the vendor is *bona fide* and for a full and valuable consideration, the fraudulent intent of the vendor alone, will not render the conveyance void, although it might be void for other reasons.
4. A debtor may prefer one creditor to another, and may transfer all his property to one, and leave the other wholly unpaid.
5. A conveyance will be deemed *bona fide* and honest, unless fraud is proved, or can be presumed from some evidence upon which a presumption may be raised.
6. An intention to secure a member of a firm against the ultimate consequences of an insolvency supposed to exist, is not a valuable consideration for a deed of sale; but a liability may form a good consideration for a mortgage or sale of property, but the liability must happen before the consideration is complete.
7. Secret trusts and powers are not favored by the law, and are not permitted to stand in the way of creditors and purchasers.
8. Retaining possession, after a sale of personal property, is such evidence of fraud, as should be left to a jury.
9. If A. purchase of B. for a valuable consideration, and honestly to secure himself and not to defraud creditors, his purchase will be good, although he knew at the time that B. was greatly indebted and actually in insolvent circumstances.
10. Where possession does not accompany the sale of property, the sale will be fraudulent and void as respects creditors. (Note a.)
11. A bill of sale made secretly, and to be kept secretly, where the possession remains with the vendor, will be void as to creditors.
12. A bill of sale's being conditional, where the property remains in possession of the vendor in pursuance of that condition, does not save the transaction from being fraudulent as to creditors and purchasers.
13. Where a vendor makes a deed with intent to defeat his creditors, it is void notwithstanding the vendee had no such intention on his part. See note 3 in this case.

APPEAL from the Circuit Court of Cooper county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of detinue brought by Sibly against Hood for three slaves. The plaintiff had judgment. The bill of exceptions shows that about the year 1821, Sibly entered into partnership with one Boggs, and one Bales, with a view to trade (291) with the Osage Indians and others. The terms of the partnership were, that Sibly was to furnish the capital and goods that were to go in trade. That he took on himself individually and agreed with the partners, that he would be individually responsible to the U. S. for the payment of the outfit of goods. It was further agreed that Boggs and Bales should carry on the trade with the Indians in person, and that

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after the capital employed was remitted to Sibly, the profits were to be equally divided, and that if there happened a loss, it should be equally borne by all the partners. It further appears that accordingly the business of the trade was immediately gone into.

In the month of March, 1825, judgment was obtained against Sibly for about the sum of twelve thousand dollars, on three protested bills of exchange, two drawn by Sibly, and one by Bales and Co., in favor of the United States, and accepted by Sibly, which bills appear to have been given for the goods before mentioned, that between this time and March, 1828, Sibly paid the amount of said judgment.

That on the 11th of July, 1825, Boggs, by a bill of sale, sold to Sibly the three negroes in question. The deed of sale refers to the partnership, and alleges that it had been a losing concern; and that there were considerable debts due by the firm, for which Sibly was personally responsible; and it being doubtful if the funds of the firm would be sufficient to pay the debts, and that Boggs being in good faith bound for his proportion of any loss said firm might sustain, and that he was actually indebted to the firm in a large sum, say one thousand dollars. With a view therefore to discharge his obligation to Sibly, as far as he was able, he sold the slaves to him.

That the negroes were to remain in Boggs' hands, he paying the taxes and finding clothing for them, until such time as it might be necessary to use them or any part of them for the payment of any debt that Sibly might be obliged to pay on account of the firm, or until Boggs should think proper, by future arrangements, to deliver them to Sibly.

The bill of sale then says, that A. Gamble was present, to whom the matter was (292) fully explained. The bill purports to be made on the consideration of eight hundred dollars.

It was proved that Mr. Gamble told Sibly and Boggs it was necessary to record the bill of sale, and that Sibly said he did not wish to make it public on account of some expressions used in it, relating to the condition of the firm, and requested that the making of it might be kept secret.

It was also proved that at the time of making the bill of sale, Sibly was largely indebted to the U. S. for the goods used as the capital of the firm, and at that time there were judgments against him for a large amount, and that he paid these judgments afterwards.

It also appears that by the terms of the articles of co-partnership, the co-partnership was to continue until dissolved by mutual consent, or until the death of either of the co-partners. It does not appear whether the partnership did or did not exist at the time of making the bill of sale, nor does it appear that it is yet dissolved.

There is no evidence to show whether the firm was solvent or not. It is alleged by the bill of sale, that Boggs was largely indebted to the firm at the time he made it, perhaps to the amount of one thousand dollars. But Boggs says in his deposition the accounts of the firm are unsettled, and that he does not know whether, on settlement, he will owe the firm anything. And it does not appear that he was indebted to Sibly in any amount.

It is proved that Boggs kept possession of the slaves until they were sold under an execution in favor of Hood. That in October, 1825, Hood obtained a judgment by confession, against Boggs, for a debt contracted with him several years before, for the sum of \$800. That Hood took out an execution on the judgment, and on the

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17th of February, 1826, caused the slaves to be sold, and became the purchaser of them for the sum of \$826.

It is proved that Hood had no notice of the bill of sale to Sibly, and that Sibly, at the time of making the bill of sale, had notice of Hood's debt.

It was further proved that at the time of the date of the bill of sale, Boggs was (293) largely indebted to sundry other persons, to more than the amount of his effects.

Upon this state of facts the parties went to trial before a jury. Whereupon the counsel for Sibly prayed the Court to instruct the jury:

First. That fraud is not to be presumed.

Second. That in order to constitute a sale fraudulent in fact, as against creditors, it must be made with intent on the part of the vendor to defraud, delay or hinder creditors.

Third. That although a conveyance is made with intent on the part of the vendor to defraud creditors; yet it is not void if it were taken on the part of the vendor *bona fide* and for a full and valuable consideration.

Fourth. That a debtor may lawfully prefer one creditor to another, (not having a lien,) in the payment of his debts, although in giving such preference he transfers all his property to one creditor, and leaves his other creditors wholly unpaid.

Fifth. That the jury are bound to find that the conveyance from Boggs to Sibly was *bona fide* and honest unless the contrary is shown from the proof.

Sixth. That the liability of Boggs to refund to Sibly his proportion of what Sibly might be compelled to pay out of his individual property in satisfaction of the judgment against him in favor of the U. S., or to indemnify Sibly against Boggs' proportion of that judgment, constitutes a valuable consideration of the deed for sale.

Seventh. That if Sibly, at or before the commencement of the suit was compelled to pay any part of the judgment in favor of the U. S., out of his individual property, he is entitled to the possession of the slaves according to the stipulations of the bill of sale.

Eighth. That Boggs continuing in possession after his sale to Sibly, does not, under the circumstances of this case, *per se*, constitute the conveyance fraudulent and void.

Ninth. That Boggs continuing in possession after his sale to Sibly, was consistent with the deed to Sibly.

Tenth. That Boggs continuing in possession after his sale to Sibly is, under the circumstances of this case, no evidence of fraud.

(294) Eleventh. That if the purchase by Hood, under the judgment against Boggs, was construed between Hood and Boggs to defeat the sale to Sibly, Hood acquired no title to the slaves as against Sibly.

Twelfth. That Sibly, permitting Boggs to remain in possession of the slaves after his purchase, is no evidence to show that such purchase was fraudulent.

Thirteenth. That although Boggs was greatly indebted at the time of making the sale to Sibly, and in insolvent circumstances, and that fact was known to Sibly, yet the sale to Sibly is not therefore void, if Sibly's purchase was for a valuable consideration, and honestly taken to secure himself, and not to defraud creditors.

The Court gave the instruction asked for except the 11th and 12th, which were refused, to the giving of which the defendant's counsel excepted.

The defendant then prayed the Court to give the jury the following instructions: First. If the jury find from the evidence that there was no valuable consideration

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passing from Boggs to Sibly for the sale of the negroes, then Sibly obtained no title to the slaves by the sale, against Boggs' creditors. If they farther find that Hood was, at the time of the execution of the bill of sale, a creditor of Boggs', and that he obtained judgment and execution for his debt against Boggs, and that the negroes were levied on and sold under his execution, and that Hood became purchaser, then Sibly obtained no title by his bill of sale as against Hood.

Second. If they find that the deed from Boggs to Sibly was executed secretly, and that Sibly requested that the same should be kept secret, and it was kept secret and not recorded, and that Hood was a creditor at the time and purchase of the negroes without knowledge of the existence of the deed to Sibly, and that Boggs remained in possession till the levy was made under Hood's execution, and that Boggs exercised acts of ownership over the slaves, such as would naturally induce people generally to believe Boggs to be the owner, then the deed of sale cannot prevail against Hood.

(295) Third. If they find that the deed from Boggs to Sibly was made secretly, and that Sibly requested that it might be kept secret, and that it was kept secret, and that Boggs was largely indebted at the time, it is evidence of fraud, as against creditors and subsequent purchasers.

Fourth. If they find that the possession of the negroes did not accompany or follow the deed, it is void against creditors.

Fifth. If they find that the transaction between Boggs and Sibly was secret and so remained, it is evidence of fraud as against creditors and purchasers.

Sixth instruction is the same as the fourth.

Seventh and eighth instructions asked were given.

Ninth. If the jury find that the deed from Boggs to Sibly was executed by Boggs for the purpose and with the intent to defraud his creditors, then such conveyance is void as against the creditors of Boggs, notwithstanding Sibly may not have participated in or been conusant of the intention of Boggs to defraud his creditors.

Tenth and eleventh instructions asked were given.

The Court refused to give the second, the fourth, sixth and ninth instructions, and gave the others.

The Court rejected some testimony on the part of the defendant, but rightly, because the matter to be proved was admitted on the record.

It is assigned for error that the Court gave the instructions for the plaintiff as above stated, and refused to give those asked for by the defendant.

The first instruction complained of is, that fraud is not to be presumed, but must be proved.

It is true that fraud is not to be presumed without some evidence upon which a presumption can be raised. This instruction amounts to no more than a general direction to the jury, that they must have proof to enable them to find an affirmative matter in issue. This point is ruled for the appellee.

Second. There is no error on the second instruction given for the plaintiff, which assumes that to constitute a sale fraudulent in fact, it must be made with (296) an intent to defraud, delay or hinder creditors. There are two kinds of fraud, one in law founded on facts without regard to the intention of the actors. This is called fraud in law. The other regards the intention, and is called fraud in fact. According to this definition, the instruction is right. But this doctrine is only true as a general proposition. Such a conveyance would not be void for the fraudulent intent

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of the vendor alone, when the transaction on the part of the vendor was *bona fide* and for a full and valuable consideration. Yet such conveyance might be void for other reasons, as the possession with the vendor, or other things forbidden by the policy of the law.

Third. The third instruction given is correct, subject to the restriction as above laid down with regard to the second instruction.

Fourth. The fourth instruction is correct, subject to the same rules as the two preceding.

Fifth. The fifth instruction is true, subject to the rule as laid down with regard to the first instruction.

Sixth. The sixth instruction given by the Court was, that the liability of Boggs to refund to Sibly his proportion of what Sibly might be compelled to pay out of his individual property, in satisfaction of the judgment against him in favor of the U. S. or to indemnify Sibly against Boggs' proportion of that judgment, constitutes a valuable consideration for the deed of sale. The bill of sale alledges that the consideration was eight hundred dollars, which was disproved by the deposition of Boggs. The true and real consideration is, as explained afterwards by the deed itself, and supported by the testimony of Boggs, which explanation is, that the trade of the firm had been unprofitable, and that large debts existed against the firm, for which Sibly was personally responsible, and that it was unknown whether the funds of the firm would be sufficient or not to pay the debts, and that Boggs, wishing to secure Sibley against any final loss, made to him the bill of sale to secure Sibly against that loss if it should happen.

Our opinion is, that taking the whole of this instrument together, the true construction is that the parties intended to secure Sibly in the end against the consequences of an ultimate insolvency of the firm which was supposed to exist. But until this event does happen, it cannot be known whether the consideration of the bill of sale had any good foundation.

There is no evidence that the firm is in reality insolvent, and for any thing appearing on the record, the firm may be solvent and may reimburse Sibly to the full extent.

It is not intended to be disputed, that a liability may form a good consideration for a mortgage of land or personal property, or that it may be a good consideration even for a sale of property; but in every case where there is any condition annexed, the condition must happen before the consideration is complete; and in every case of the mortgage or sale of property to secure one against a liability, the rights of the public at large, and all the laws respecting fraud on purchasers and creditors must be attended to at the peril of the parties concerned.

This instruction would be correct enough if it were shown that the firm was insolvent; but until that is shown the instruction cannot be given.

Seventh. The seventh instruction given for the plaintiff was, that if Sibly, at or before the commencement of this suit, was compelled to pay any part of the judgment in favor of the U. S. out of his own property, he is entitled to the possession of the slaves according to the stipulations of the deed of sale.

The stipulations of the deed are, that Boggs may keep possession of the slaves till it shall be necessary to use them or a part of them for the payment of the debts which Sibly was bound to pay on account of the firm, or until by future arrangement, Boggs should give the possession to Sibly. The first part of this stipulation amounts to a power and authority, to Mr. Sibly, to take possession of the slaves whenever it

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should be necessary for him to do so to pay the debts before mentioned. Whence this necessity was to arise, we cannot tell. The necessity might have arisen from the insufficiency of the funds of the firm to help Sibly out, or it might have arisen (298) from the deficiency of Sibly's own funds. Let the necessity arise from whence it might, the power which Sibly might have exercised, has never been used. If the negroes had been sold by Sibly in pursuance of the power, before Hood acquired his right by levying his execution, we cannot doubt that the purchaser of the slaves under the power would have acquired a good right to the property. In this case the parties created a secret mortgage or sale resting on a contingent consideration which we cannot see has yet happened, and a power to be exercised on a contingency resting partly on the choice or will of the party most interested to exercise it, yet never exercised until this day: and after Hood has levied his execution, effected a sale of the slaves and become the purchaser without notice for a valuable consideration. The Circuit Court instruct the jury that Sibly has the right to the possession. Secret trusts and powers are not favored by the law. They are not permitted to stand in the way of creditors and purchasers. The Circuit Court erred in giving the seventh instruction.

Eighth and tenth. We will consider the eighth and tenth instructions together, as they are in substance the same.

The eighth instruction for the plaintiff is, that Boggs continuing in possession after his sale to Sibly, does not, under the circumstances of this case, *per se*, make the deed fraudulent.

The tenth is, that Boggs continuing in possession as aforesaid, is, under the circumstances of this case, no evidence of fraud. Neither of these instructions ought to have been given.

For the Court to decide that under all the circumstances of the case, the thing is neither fraud *per se*, nor that there is any evidence of fraud, seems to us to determine the whole case, both facts and law. The question of fraud or no fraud should have been left to the jury.

The possession by Boggs, with the other evidence in the matter relating to the possession, was at least some evidence of fraud, and should be weighed by the jury. See 4 *Cranch R.* 71. The ninth instruction given by the Court is correct.

(299) The thirteenth instruction which assumes that although Boggs was greatly indebted at the time he made the deed to Sibly, and in insolvent circumstances, and that fact was known to Sibly; yet if Sibly purchased for a valuable consideration and honestly to secure himself, and not to defraud creditors, the deed is not therefore void.

This instruction is correct; if the deed is not void for other reasons, the reasons above mentioned will not make it void.

We will now consider the instructions asked for on the part of the defendant and refused by the Court.

The second instruction asked and refused was, that if the jury find the deed from Boggs to Sibly was executed secretly, and that Sibly requested the same should be kept secret, and it was kept secret and not recorded, and that Hood was a creditor at the time, and purchased the negroes without knowledge of the existence of the deed, and that Boggs remained in possession till the levy was made by Hood, and that Boggs exercised acts of ownership over them, such as would induce persons generally to believe Boggs to be the owner of them, the deed cannot prevail against Hood. This

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instruction was entirely refused. We are of opinion that the substance of this instruction should have been given.

In the case of *Hamilton v. Russell*, 1 Cr. 309, there was an absolute bill of sale of property. The possession was left with the vendor, and his creditor was entitled to sell the property to pay his debt, on the ground that such a sale being absolute and unconditional, and yet the possession being left with the vendor, the transaction was fraudulent and void against creditors.

We believe the law is well laid down in that case. We have some decisions in this State on the same subject. In the case of *Rocheblave v. Potter*, 1 vol. Mo. R. 561, it was decided by this Court that where a bill of sale was executed by A. to B., and the vendor was permitted to remain in possession of the slaves sold, and died in possession, and the executor of the vendor sold the slaves to a third person, the purchaser from the executor was entitled to hold the property against B., the vendee.

(300) This decision was made on the broad ground that when the posession and title are severed, the possession gives the title to the purchaser who purchased under the faith that the title rested with the possession. In this case the bill of sale was absolute.

In a late case the same doctrine was again held by this Court, in *Wallace v. Foster*. In this case one Simmons was largely indebted. Among others he was indebted to Wallace. Simmons made a bill of sale of several slaves to Foster, who was his father-in-law, and some evidence to show that there was a valuable consideration from Foster for the slaves, was given. Simmons remained in possession till the time of his death. Foster then took possession of the slaves. Wallace sued him as executor.

The bill of sale was absolute on its face. This Court decided that the sale by Simmons to Foster was void, because the possession did not accompany and follow the deed, 2 vol. Mo. R. 231.

Many authorities have been cited on both sides of this question. Messrs. Hayden and Wells for Hood have cited the above cases, and rely on them, besides many others. We are of opinion that the second instruction asked should have been given with some qualification. We understand the law to be that when the owner of personal property sells it to a person either on a real or feigned consideration, and the property is nevertheless left in possession of the vendor, creditors of the vendor for a real *bona fide* consideration, are entitled to have the property sold to pay their debts; and of course the purchasers under their executions are to be protected. Here Hood was both purchaser and creditor. If Hood's debt had been contrived between him and Boggs to defeat Sibly's security, then, so far as he is concerned, he would not be entitled to any protection. But we do not mean to say that in that case purchasers of the property at Sheriff's sale would not be entitled to protection, if such purchasers were other persons than Hood himself.

As the case now stands on the record, we have no doubt that the bill of sale as to (301) Hood is entirely void, because made secretly with a view to be kept secret, and that it was kept secret, yet the possession remained with Boggs.

Mr. Leonard insists that this case does not come within the case of *Hamilton* and *Russell*, and the cases of *Rocheblave v. Potter*, and *Wallace v. Foster*, because in all those cases the deeds of sale were absolute, and the possession of the property was inconsistent with the deeds. But in this case the deed of sale is conditional. To sustain this position 1 *Pickering* is cited 389; 2 *Kent Com.* 406. We readily admit

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that there are cases where it has been holden by respectable Courts, that if possession of the property is consistent with the deed, the deed is not void notwithstanding the possession did not accompany the deed. We are of opinion that the circumstance that a bill of sale is conditional, and that the property remains with the vendor in pursuance of that condition, does not save the transaction from being fraudulent as to creditors and purchasers. If it did, how easily the parties would provide for their safety in every case. The fact that the deed is conditional, in our opinion amounts to nothing, especially when both the deed and the condition were kept secret from the public and Hood.

Chancellor Kent seems to be of opinion, that some reason ought to exist, beyond the mere convenience of the parties, to justify the possession remaining with the vendor. We think so too; and that reason ought furthermore to be one which would enable the case to steer clear of conflicting with the public policy of the country.

Considering this case merely in reference to Sibly and Boggs, the transaction is fair and honorable, and free from any legal objection; but when viewed in reference to the rights of *bona fide* creditors and purchasers, and especially purchasers without notice, and for a valuable consideration, we feel constrained to say, the judgment of the law is, that as to such creditors and purchasers the deed is fraudulent and void.

The Court refused to give the fourth and sixth instruction asked by the defendant: those two instructions were in substance the same, and as the law involved in them (302) has been answered in the view given by us regarding the second instruction, we will say nothing more on them.

The ninth instruction asked by the defendant and refused by the Court, assumes that if Boggs' intention was to defeat his creditors by making the deed, it is void notwithstanding Sibly had no such intention on his part.

In the aspect in which we view this case, that instruction might well have been given. But if the second instruction asked had been given as understood by this Court it should have been, then this instruction would have been unnecessary. It is unnecessary now to say any thing farther on this point.

The judgment of the Circuit Court is reversed with costs, the cause is remanded for a new trial.

(a.) Overruled in *Shepherd v. Trigg*, 7 Mo. R., p. 151. See *Ross v. Crutsinger*, 7 Mo. R., p. 249.

HARRYMAN v. TITUS.

1. Unless the law require a full detail of a judicial transaction to appear, where the main conclusion of a transaction appears to be right, the law will in general presume the details to be right also; but in *ex parte* cases, where it is believed every thing must appear to be correct, this presumption will hardly be made.
2. A party who wishes to detain property as an estray, must show an exact compliance with the law on the subject of taking up estrays, both on his own part and on that of the justice before whom the appraisement is made.

ERROR.

M'GIRK, C. J., delivered the opinion of the Court.

Titus brought an action of trover before a Justice of the Peace, to recover the value of a steer, and had judgment. Harryman appealed to the Circuit Court, where Titus again had judgment. It appears by a bill of exceptions, that on the trial in the Circuit Court, the plaintiff, Titus, gave evidence to establish his claim to the steer, and also, gave evidence of trover and conversion in the defendant. The defendant then attempted to prove that he took the steer up as an estray, and that the plaintiff (303) had not paid him nor tendered to him the 37 cents allowed by law, as a reward for the taking up.

The first testimony offered by Harryman, to show that he took up the steer as an estray, was the testimony of Gun, the Justice, who swore that on the third of November, 1832, Harryman appeared before him, and took the oath required by law to be taken by takers up of strays, that he, the Justice, reduced the oath to writing, and had the writing in his possession; the Justice also swore that he had appointed appraisers, who appraised the steer.

The defendant then offered to read in evidence a certified copy from the Justice's book, to show the description of the steer and the appraisement, which copy is in substance as follows: Notice. Taken up, by Thomas Harryman, as a stray, one steer, of a dark brown color, five years old, marked with a slit in each ear, a star in his forehead, hind legs white, some white on the end of his tail, supposed to be a work steer, no brands perceptible, appraised to ten dollars, by H. W. Burch and James Harryman. Signed, S. Gun, Justice of the Peace, with his certificate that the same was a true copy from his stray book.

The plaintiff's counsel objected to the reading of the copy, on the ground that it furnished no legal testimony that the steer was posted according to law. The Court rejected the paper.

Mr. Wilson, counsel for Titus, points out several objections to the paper.

First. It does not appear by the paper that the appraisers were sworn as the law requires they should be; and

Secondly. It does not appear that the appraisers were disinterested householders, as the law requires they should be.

Harryman v. Titus.

Mr. J. Clark, for Harryman, insists that these things need not appear by the record made by the Justice. That the law presumes that the Justice did all the law requires of him to be done, and that the Circuit Court should have presumed so too.

This presumption is useful when properly used. It is proper to use it only in those (304) cases where the law does not require a whole detail of a judicial transaction to appear. If in such cases the main conclusion of a transaction appear to be right, the law presumes the details are right also, unless the party interested or injured has had an opportunity, and will show that something was wrong. This has not, in general, been extended to *ex parte* cases. In such cases it is believed the rule is, that all must appear to be correct.

The law is unwilling to commit the interest of absent parties. It therefore, makes but little presumption in favor of *ex parte* proceedings of any kind.

Having said this much, we proceed to lay down the rule to be, that the party who seeks to detain property as an *estray*, must show that he did all on his part, exactly as the law requires it should be done; and secondly, that he must show that all the law required of the Justice was done by him.

As regards the oath of the party in this case, the Justice swears that he administered the oath to the taker up required by law. This oath, we conceive, need not be in writing, because the law has not required it to be in writing. But the information required of the party when under oath, is to be reduced to writing, because the law requires that the information to be given by the taker up, as to the color, marks, brands, &c., shall be entered with the appraisement on the *stray book* of the Justice. See the statute, *Revised Code*, 755-6, sections 1 and 2.

Nothing appears on the record to show that the Justice did take the description of the steer from the party under oath. Nor does it appear that this description was taken at all from the party; as the law requires this to be done, and as it has not been done, we cannot say the steer has been duly posted; a copy of the Justice's book of this matter would have satisfied the law, if it showed a description of the *stray*, and that the information was given under the oath of the party. This evidence, if it existed, should have preceded, or at least accompanied the appraisement offered and rejected, otherwise the appraisement, if ever so good, could not be received in evidence. But (305) the appraisement as it stands, should show of itself, that the appraisers acted under oath, or might be sufficient to show by the Justice's certificate of the oath, that they acted under oath, or at least it should have so appeared on the trial. It should have also been made to appear that the appraisers had the necessary qualifications, *to-wit*: That they should be disinterested persons and householders, without which no good appraisement can be made.

This view of the matter establishes the point, that there was no legal taking up of an *estray* in the case. It, therefore, is unnecessary to take any particular notice of the instructions refused by the Court to be given, as required by the plaintiff in error.

There is one instruction which was asked by Harryman and refused by the Court, which it will be proper to notice.

The instruction asked was, that inasmuch as Harryman had a lawful right to take up the steer, and did take him up, he is entitled to 37 cents, allowed by law as a fee for taking up. The party was entitled to this sum, before the owner had any right to demand or recover the property, although he, himself, did not complete the posting

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of the beast, by none of his own neglect, or the ignorance of the Justice. This instruction the Court refused to give, and we think correctly.

The law gives 37 cents to the taker up for that act. Now if the owner applies for the property within the ten days, he is to have his beast if he will pay the 37 cents; if not, the law authorises the taker up to detain the beast for that reason. But if the owner does not apply for the beast within the ten days, then the taker up is bound to proceed to post the estray; and if he does not do so in good faith, or should proceed to do it in such manner as not to comply with the requisitions of the law, he is from the end of the ten days a transgressor, and in such case the rule is, that if a thing be begun lawfully, but be carried on or ended unlawfully, the transaction is void from the beginning. If it were not so in this case, the taker up would, if dishonest, only arrest or take up the beast, claim his 37 cents, if any one ever demanded (306) the stray, would claim to them on the ground of a taker up, when, at the same time, he would conceal the means of knowledge from the owner. To allow this fee in this case, would be contrary to the spirit of the stray law, which is so anxious to have all things done right, and in due time, that it imposes a penalty of \$20 on a person who shall begin the process of taking up, and not go through with it.

The judgment of the Circuit Court is affirmed with costs.

NANCY v. TRAMMEL.

When a demurrer to a bill of discovery is overruled, the bill, or so much as remains unanswered, is taken as confessed; and the confessions of the bill are, in law and equity, as complete as the confessions could have been, had the bill been answered and every part thereof charged to exist, being expressly admitted.

M'GIRK, C. J., delivered the opinion of the Court.

The plaintiff, Nancy, brought an action for her freedom, against Trammel. After the action was brought, she filed a bill for a discovery, alledging that she became entitled to her freedom by reason, that some 24 years before the bringing the action, her grandmother was a slave in Kentucky, and that her owner removed from Kentucky and took her with him to the N. W. Territory, and kept her there as a slave, by which residence her grandmother and her descendants are entitled to their freedom. That said Trammel during said residence purchased her grandmother in said Territory, that her mother was born in said Territory, and Trammel claimed her as a slave, that he then removed to Missouri, where the plaintiff was born. That she has made search for proof of those facts, and the defendant only knows them. The

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defendant demurred to the bill. The demurrer was overruled, the defendant was ordered to answer, which he failed to do, the bill was then taken to stand confessed. (307) On the trial of the suit for freedom this bill with the proceedings were offered in evidence. The Court refused the evidence. The plaintiff suffered a non-suit, moved to set aside the non-suit, which was refused.

The error assigned is the rejection of this evidence.

It is insisted by the Attorney General, that the act of the General Assembly authorizing this bill of discovery, only authorizes the answer to be read in evidence when obtained, and that if the party refused to give his answer, the Court could compel him to do so by attachment and sequestration, and that there is no difference between this case and the case where any other witness refuses to answer.

To prove this proposition he cites the *R. C.* 631; *Tompkins v. Ashley*, 22; *Com. Law R.* 239; 1 *Stark. Evi.* 288, ch. 23; 2 *Stark. Evi.* 239; *Peake* 54, 56; 1 *Phil. Evi.* 264-5.

On the other side Mr. Hayden, for the plaintiff, insists that the demurrer admits all the facts alledged in the bill. That the bill being taken *pro confesso* for want of an answer admits the facts stated in the bill. To prove this, and to show that the plaintiff is entitled to read the bill as evidence, as facts admitted, he cites 1 *Marshall R.* 335; *Coop. Equity* 111-12-13 207.

The act of the Legislature under which this proceeding for a discovery was had, *R. C.* 631, says that in all trials at law, either party may have a discovery of the other of matters pertinent to the issue, by filing his bill, &c., and the other shall answer thereto or demur, in the same manner, and for like cause, as in case of a bill of discovery in chancery; and the Court shall have the like power to enforce a discovery, and to proceed in all matters in relation thereto as by the ordinary rules in chancery in like cases, and the answer may be read, &c.

The act is silent as to what shall be the effect of a bill demurred to and the demurrer overruled. It is also silent as to what shall be the effect when the bill is taken as confessed for want of an answer.

The first case cited by the plaintiff in error, is exactly in point, a Kentucky decision which if entitled to respect so far as it comports with authorities; but none are cited in the case.

(308) We must examine the case in reference to authorities so far as this can be found to bear on the subject. The act of the General Assembly respecting chancery practice, *R. C.* 639, says that if the defendant's demurrer is overruled he shall answer the bill instanter, or in default thereof the bill, or so much thereof as remains unanswered, shall be taken as confessed. In this case the defendant failed to answer. The judgment of this statute is, that his bill be taken as confessed; what does this mean? In our opinion it means this: that for all the purposes of the bill, the confessions of the bill are, in law and equity, to be as complete as the confessions could be, had he answered and expressly admitted every part therein charged to exist. If this is the true meaning of the statute, it is useless to search for further authority on the subject.

With regard to the effect of a demurrer to a bill of discovery, *Cooper*, in page 111, lays it down that the demurrer admits the facts sought to be discovered. None of the authorities on either side come very near the point in question, except the case cited from 22 *Com. L. R.* 239, by the defendant's counsel. It was holden in that case, that a demurrer to a bill of discovery does not admit the facts contained in the

Ford v. Howard county.

bill so as to make those facts evidence, as facts admitted in a suit at law between the parties. This decision is contrary to the law as laid down by *Cooper*. Thus far the English authorities appear to balance; but the present case is not the case alone of facts admitted by a demurrer; but it is also, a case where the statute declares the bill shall be taken as confessed. That is, as if the party had expressly acknowledged all to be true as stated in the bill.

The Circuit Court erred in refusing to set the non-suit aside. The judgment is reversed and remanded.

(309) FORD, SHERIFF OF HOWARD COUNTY, v. THE CIRCUIT COURT OF SAID COUNTY.

A Sheriff cannot recover expenses incurred in executing a sentence of death.

MOTION FOR A PEREMPTORY MANDAMUS to the Circuit Court of Howard county.

TOMPKINS, J., delivered the opinion of the Court.

Ford applied to the Circuit Court to have allowed him two accounts, the one for expenses incurred in the execution of Jacob Stewart, convicted of murder at the March term term of that Court for the year 1830; the other for expenses incurred in the execution of Hampton, a slave, convicted of murder at the February term, 1832. These accounts the Circuit Court would not allow, and at the last term of this Court, at the instance of Ford, a conditional mandamus was awarded, requiring the Circuit Court to show cause, and on the return to that mandamus the cause is brought up. Ford now moves for a peremptory mandamus.

The charges are for erecting a gallows, conducting the prisoners to execution, furnishing rope to hang them, coffins, &c. No fees for such services are allowed by the act to regulate the fees of the several officers of this State, passed the 19th February, 1825; and the 29th section of that act imposes a penalty on any officer receiving any more or greater fees than are allowed by that law. No other law authorizes the Circuit Court to allow pay for such services. The Sheriff is allowed ten dollars for executing the sentence of death, and this sum is to be paid by the State, when there is no estate of the deceased whereof the money can be made. It certainly could not have been intended by the Legislature that the Sheriff should, out of that sum, pay for the erection of a gallows, a coffin for deceased, and the expenses of burying him, when it become necessary to perform such services. But

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the power to allow such expenses is not given by it to the Circuit Court. We are therefore of opinion, that that Court did not err in refusing to allow the accounts. The motion therefore for a peremptory mandamus is overruled.

(310)

MAUPIN v. PARKER.

The acts of the General Assembly of 17th January, 1831, to provide for the sale of the township school lands, is not repugnant to the nature of the grant, nor does it conflict with any provision of the Constitution of this State. The General Assembly having power to provide for the sale of these lands, for the use of schools, a purchaser of any of these lands under said act, acquires a valid title in fee simple to the same.

APPEAL from the Circuit Court of Boone county.

TOMPKINS, J., delivered the opinion of the Court.

Maupin brought his action in the Circuit Court of Boone county against Parker, for money had and received by the defendant to the plaintiff's use. Plea non-
assumpsit, and issue joined. An agreed case was made as follows: The plaintiff and defendant agree to the following as "the facts of the case: On the first Monday in November, 1831, the defendant, who was and is Commissioner of the School Lands in the county of Boone, duly appointed, and constituted, and qualified, according to the provisions of the act of the Legislature of this State, entitled an act to provide for the sale of the township school lands of this State, approved the 17th day of January, 1831, sold to the plaintiff the south-east quarter of section sixteen, in township forty-nine, in range 12, in the county of Boone, being the land granted by the United States to the State of Missouri, for the use of the inhabitants of said township, for the use of schools, for three hundred and forty dollars. The plaintiff paid the defendant, as Commissioner, the purchase money, on the 7th day of November, 1831, and has received a conveyance of the land in pursuance of, and according to, the provisions of the act of the Legislature of this State.

Now if the Court shall be of opinion that a sale and conveyance of any of the land mentioned in the said act of the Legislature of this State, made in pursuance of and according to the directions of said act, cannot and will not transfer to the purchaser thereof a good title in fee simple for the same, judgment shall be given for the plaintiff for the purchase money, &c., otherwise judgment shall be given for the defendant, &c.

The Circuit Court gave judgment for the defendant, and the plaintiff, to reverse the judgment, appeals to this Court.

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By an act of Congress to authorize the people "of the Missouri Territory to form (311) a Constitution, &c., passed 6th March, 1820, it is provided that section number sixteen in every township, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of the inhabitants of such township for the use of schools." See section 6th.

On the part of the appellant it is contended that the State is a mere trustee, and has by virtue of the grant from Congress a mere legal estate for the use and benefit of the inhabitants of the township. If Congress had intended that the State should have any control over the land thus granted, why, it is asked, was not the exercise of that control provided for as in the case of the Saline lands granted to the State, in the same section, for its own use. It is also contended, that from the circumstance of the land thus granted lying in the centre of each township, it is to be inferred that it was the intention of Congress that schools should be established on the sixteenth section for the use of such townships. Had the grant been made to A. for the use of B., there is no doubt that A. would have no right to alienate the land so granted. But the land thus granted is given to the State for the use of the inhabitants. The State then has the same jurisdiction over this land that she has over the real property of any individuals living within her limits, and the United States have divested themselves of their right of control over this land, as much as they have over the lands sold to individuals, with the express pledge of the State that the inhabitants of each township would be permitted to enjoy the same for the use of schools; but the State of Missouri was equally bound to protect every individual who had, before her admission into the Union, purchased land from the United States, in the enjoyment of his property. Yet it could not be doubted that the Legislature (which we may call the agent of the State) have not the right to change any of the laws in force, at the time the State entered the Union, although the mode of enjoying the lands purchased of the United States might thereby be changed. (312) For instance, the Legislature might well pass a law to authorize the wife during coverture to dispose of land that she held in her own right; or the husband might be authorized to dispose in fee simple of lands that descended to his wife.

In the case now before us, the legislative body have said that on petition of three-fourths of the householders of the township, the County Court may direct the 16th sections to be sold, because that majority of the inhabitants of the township believe the proceeds of the sale will be more useful to them for the advancement of education than the land would be. The State has entrusted the legislative body the same power over these lands that has been given to it over the estates of individuals. It can divest neither the one nor the other of the right of property; but it only in the one instance allows the individual to alienate in a manner different from what he did before, and in the other allows the school lands to be sold and enjoyed as personal property, on petition of three-fourths of those interested in them. The State here is trustee, and is said to have no other interest in the land granted for the use of schools, than an individual trustee. It is granted that in character of trustee, the State has a mere legal estate in the land; but in character of sovereign of the country, it has the same right over those lands that it has over other lands lying within its limits: it cannot direct the fund to any other use than that of schools; but through the legislative body it can make rules to direct in what manner the funds arising from such lands, whether by sale or lease, shall be applied, leaving to the in-

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habitants of the township always the choice of retaining the land or of alienating it. It might be objected that every inhabitant of the township, having an interest in the land, cannot be compelled to alienate. To this it may be answered that unanimity is not to be expected from the inhabitants of any township in the mode of enjoyment, and all the Legislature can do is, to preserve the property for their use, in such manner as to it shall seem best to a majority of those interested. It has seemed proper to the Legislature to authorize the Courts, on application of three-(313) fourths of the householders of any township to sell those lands; but still the money arising from such sale is the property of all the inhabitants of the township, and cannot be by this law divested from the use directed by the act of Congress. The Saline lands, it may be observed, were given to the State for her own use, therefore Congress, in giving them, prescribed how they should be leased by the Legislature; and has by a subsequent act authorized the Legislature to sell them. But the inhabitants of the township being the beneficial owners of the school lands, the power of selling them could not with so much propriety be vested in the Legislative body. The Legislature representing the State, and exercising its powers, passes an act authorizing the inhabitants of the township, who alone have the beneficial interest, to sell under certain regulations. But we are met by the authority of a decision of the Supreme Court of Tennessee on the same subject. It seems that the Legislature of that State requested the opinion of the Judges of the Supreme Court upon the powers of the Legislature to sell and convey the school sections reserved for the education of children, by virtue of the compact with North Carolina and the United States of 1806.

The subject, the Judges of that Court state, was examined with the care its importance merited, and they concluded that the Legislature had not the power to sell.

The article of compact between Tennessee and North Carolina and the United States reads thus:

"And the State of Tennessee shall moreover in issuing grants and perfecting titles, locate six hundred and forty acres to every six miles square in the Territory hereby ceded, where existing claims will allow the same, which shall be appropriated for the use of schools for the instruction of children forever."

The language of the act by which the 16th sections are granted to this State, is as follows: *these sections* shall be granted to the State, for the use of the inhabitants of such township, for the use of schools.

It cannot be contended that the terms used in the grant to the State of Missouri (314) are much less strong than those used in the compact between the States of North Carolina, Tennessee and the United States. To differ in opinion from so highly respectable a Court, is enough to make us entertain strong doubts of the correctness of this opinion.

But we have the consolation to reflect that we have arrived at this conclusion after a patient attention to able arguments on both sides of the question. Whereas the opinion of the Supreme Court of Tennessee seems rather to have been extra-judicial.

The Judges of that Court give their opinion as in a case of William Lowry et al. v. Miller Francis, Treasurer of East Tennessee.

But the letter of the Judges of that Court to the General Assembly accompanying that opinion, informs us that the subject was examined at the request of the Legislature, and we are, for that reason, inclined to the belief that the action was a feigned one, in which a cause is never argued with so much zeal and ability, as when the

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rights of the parties are earnestly litigated. We are, for the reasons above given, of opinion that the Circuit Court committed no error in giving judgment for the defendant; and its judgment is therefore affirmed.

WASH, J., dissenting.

I dissent from the above opinion. The grant is to the *State*, for the use of the inhabitants of each township, not to the Legislature. The State is either the people, or the government, and the Legislature have no right to assume to be either. It is but one department of the government, and may be the agent of the State for the objects and duties expressed in the Constitution, and nothing more. The State is the trustee, and by its convention in forming the Constitution, has expressly limited the power of the Legislature to be exercised over the 16th section, to the taking of such measures as may be necessary to preserve it from "waste or damage," and to the proper application of the funds which may arise from the use of such lands in strict conformity to the objects of the grant. This assuredly gives no power to sell, but on the contrary, by strong implication, denies the power.

(315) And if the Legislature were the State, or the grant had been expressly to the Legislature, still as trustee, it would have no power to sell, the use is to the inhabitants in common, and by what principle shall three out of four commissioners be permitted to exclude or control the fourth in the disposition of the common use? or why should those who may claim the use to-day and by removal lose the right to claim it to-morrow, be permitted to anticipate defeat or control the use of those who may become entitled to-morrow? In looking at the objects of the grant, the character and condition of the thing granted, and the mode and manner in which it should be used and enjoyed, I feel clear that the Legislature have no authority to sell.

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IN ERROR.

BURTON v. COLLIN.

AND

COLLIN v. BURTON.

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1. An appearance in Court, and an acknowledgment of an agreement to refer all matters in difference to the arbitrement of certain persons, is a sufficient recognition of the agency of a person who has made the affidavit and recognizance required in an appeal from a Justice of the Peace.
2. An agent who receives money or property for his principal, or a factor who sells goods or property, or receives goods or property which remain unsold, is not liable to an action until the money, goods, property or account of sales be demanded.

ON APPEAL from the Howard Circuit Court.

WASH, J., delivered the opinion of the Court.

Burton sued Collin before a Justice of the Peace on an account stated thus:

Lewis Collin,

To Richard Burton, Dr.

For 2 barrels of flour sold for me at Galena, (Illinois,) at \$14.	\$28
For 700 lbs. lead promised me for bacon, flour, &c., (and not paid,) _____	\$14
	\$42

(316) And got judgment for \$33 32 1-2; from which Collin appealed to the Circuit Court, where on a trial *de novo*, Burton got judgment for \$31 75, from which Collin has now appealed to this Court. On the trial in the Circuit Court, Burton proved that in the year 1829, Collin resided at a lead furnace near Galena, and that he delivered to him two barrels of flour, which Collin agreed to sell for him. That about a week after the delivery of the flour to Collin, he admitted that he owed Burton between 6 and 700 lbs. of lead, without stating on what account.

That Collin removed from Galena to the county of Howard, before the institution of the suit.

The price of lead at Galena at the time Collin admitted he owed Burton was also proved, and Burton got judgment as before stated.

Before the cause was called for trial in the Circuit Court, Burton moved to dismiss the appeal.

First. For want of legal notice of the appeal, and

Second. Because there was no affidavit made nor recognizance entered into before taking the appeal by the appellant, or any authorized agent for him.

The motion was overruled and the opinion of the Court excepted to: and Burton has come with his writ of error into this Court and claims a reversal of the judgment for that cause.

Burton v. Collin, &c.

The affidavit for an appeal from the judgment of the Justice was made by James A. Clark (styling himself) agent for Collin, and is in due form. The recognizance is also in due form signed by "James A. Clark and W. Collin," in the body of which Clark is styled the agent of Collin. Before the motion to dismiss for want of affidavit and recognizance, the parties appeared in Court and acknowledged that they had mutually agreed to refer all the matters of difference to the arbitrement of certain persons named in the record.

It is contended for Burton, that the agency of J. A. Clark by whom the affidavit and recognizance were made, is not shown, and that therefore the appeal was improperly granted by the Justice, and ought to have been dismissed by the Circuit (317) Court. The answer is, that the agency of Clark was sufficiently recognized and affirmed by the appearance and submission of the parties. The Circuit Court did right therefore in refusing to dismiss the appeal, and its judgment overruling the motion to dismiss, is affirmed with costs. On the trial in the Circuit Court, the counsel for the defendant moved the Court to instruct the jury,

First. That in order to enable Burton to recover the charge for flour, he must prove a demand of the flour left with Collin before bringing suit.

Second. That if the flour was sold by Collin and Burton did not demand an account of sales or the money before suit brought, he could not recover on account of the flour.

Third. That if Burton did not demand the lead at Galena before suit brought, he could not recover on that charge in the account.

Fourth. That if Collin agreed to pay the lead in exchange for the bacon, flour, &c., mentioned in the account, then they must find for Collin, as to the item of lead.

The Court refused to give the instructions prayed for, and this refusal is now assigned for error.

It is well settled that an agent who receives money or property for his principal, or a factor who sells goods or property, or receives goods or property which remain unsold, is not liable to an action until the money, goods or property has been demanded, or an account of sales where the goods or property has been sold.

The first and second instructions prayed for, ought therefore to have been given. 1 Chit. pl. 289, 1 Tawn. 574, 2 Mo. R. 199. The Circuit Court did right in refusing the third and fourth instructions. Collin had removed from the lead furnace where he resided at the time he admitted he owed Burton the lead, and it would be unreasonable to hold that Burton should follow him wherever he might go and demand the lead at his residence before he could maintain his action.

The doctrine that when no time or place is named for the payment or delivery of personal property, (which cannot be conveniently transported,) it shall be understood (318) that the same is to be paid or delivered at the residence of the debtor, has been recognized by this Court, 2 Mo. Rep. 55, 3 Bibb. 267, 5 T. R. 409, but cannot apply in this case. The judgment of the Circuit Court in refusing to give the first and second instructions being erroneous, is therefore reversed with costs, and the cause is remanded to be proceeded in conformably with this opinion.

GREEN v. SPENCER.

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143	562
3	318
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1. Seduction may be given in evidence to aggravate the damages in an action for a breach of marriage contract.
2. A deposition containing evidence that the defendant never intended to marry the plaintiff, is admissible.
3. Evidence of general character, before seduction, is admissible.
4. In an action for breach of marriage contract, the statement of A. in the presence of B. "that she was ready to marry him, and that she had made preparations for the occasion, and that she was as ready as she ever would be," was held to be evidence from which the jury might well infer an offer to marry.

ON ERROR from the Howard Circuit Court.

WASH, J., delivered the opinion of the Court.

Spencer, the defendant in error, brought her action in the Circuit Court against Green, the plaintiff in error, for a breach of marriage contract; and got a verdict and judgment for \$5,000; to reverse which judgment Green now prosecutes his writ of error in this Court.

The evidence given on the trial in the Circuit Court, as preserved in the bill of exceptions, is in substance, that the plaintiff in error, after having been a suitor of the defendant for a year or more, entered into a contract with her to marry her in May, 1832, upon a day fixed; that a short time after the contract was entered into, the plaintiff proposed to the defendant, and she agreed to put off the marriage until some time about the 10th of September following; that when September (319) came, the plaintiff proposed to the defendant and to her father, a farther postponement, which was agreed to, and the plaintiff then promised to marry the defendant in a month or so. "That afterwards, some time in October, the plaintiff and defendant were sitting together at her father's house, and were asked by her father why they did not get married:" that the plaintiff replied that he was ready and willing to any thing, and the defendant replied that she was ready to marry, and stated that she had made preparations for the occasion, and was as ready as she ever would be. That during the time of the engagement to marry, the plaintiff seduced and got the defendant with child. That the child was born on the 27th of June, 1833, and the plaintiff admitted himself to be the father of it. That the general character of the defendant for chastity and virtue, prior to the time of her seduction by the plaintiff, was good. The deposition of one Oldham was also read in evidence, to show that the plaintiff preceding the contract to marry, had manœuvred to get the contract broken by the defendant through the influence of her father, and that the plaintiff never intended to comply with his contract. This is all the evidence it seems material to state in disposing of the questions which have been raised by the counsel for the plaintiff in error. Upon this state of facts, the counsel for Green moved the Circuit Court to instruct the jury,

Green v. Spencer.

First. That to enable the plaintiff to recover in this action, the jury must find that the agreement proved was for a marriage on a particular day; or if by the agreement no time was specified when the marriage was to take place, an offer to marry by the plaintiff must be proved.

Second. That no evidence of an offer to marry by the plaintiff has been given in this case.

Third. That the jury cannot in this case take into consideration the seduction of the plaintiff by the defendant for any purpose.

Fourth. That the seduction and getting with child the plaintiff by the defendant is an injury to the father of which the plaintiff cannot legally complain.

(320) The first and fourth instructions prayed for were given by the Court; the second and third were refused, and the opinion of the Court in refusing them was excepted to.

The errors assigned and relied on are,

First. That the Court below permitted evidence of seduction to go to the jury.

Second. That the Court permitted the deposition of Oldham to be read to the jury.

Third. That the Court below permitted evidence of general character of the plaintiff below to go to the jury.

Fourth. That the Court refused to give the second instruction asked by the defendant below to the jury.

Fifth. That the Court erred in refusing the third instruction asked by the defendant below.

The first and fifth errors assigned, may be considered together: they amount to the same thing, and present to the consideration of this Court, for the first time, a question of deep interest to the community, as well as to the parties in the cause. The counsel on both sides have argued it with zeal and ability.

For the plaintiff in error it is insisted, that the law is clearly settled that seduction cannot be given in evidence to aggravate the damages for a breach of marriage contract. Various authorities have been cited and commented on, and enforced with an eloquence and ingenuity worthy of a better cause. Such as are accessible have been examined. In 2 *Bibb*, 341, *Burks v. Shain*, the seduction took place before the promise to marry, and might have been the cause of the promise; but could not have been the consequence (as is aptly observed in that case). It appeared moreover in that case, "that the father had brought suit for the seduction, and the consequent expenses and loss of service." 2 *Philips*, 159, in treating of the evidence in an action of trespass for seduction, lays it down, that "evidence of the defendant having given the daughter a promise of marriage before he seduced her, is not admissible." The breach of such an engagement may be made the subject of another distinct action; and it is an injury to the daughter not to the parent." The counsel for the (321) plaintiff insists that the true converse of any proposition that is true, is itself true; and then contend that evidence of seduction after a promise to marry, in an action for the breach of promise, is not admissible: this proposition is not the true converse of Mr. Philips. Seduction is not a separate cause of action, nor an injury to the father alone. It needs but to consider the helpless, dependent and miserable condition of the woman who has been seduced and forsaken, to see that it is she who suffers the most direct, surest and greatest injury. In *Bayard's Peake*, 361, it is laid down, that in an action by the father, &c., for seduction, "the girl herself may be

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a witness, and prove any facts or circumstances attending the seduction, except such as would support another action at her own suit for a breach of marriage promise." This stops short of Mr. Philips' proposition; and the true converse of it would be, "that in an action for a breach of promise of marriage, any circumstances attending the breach, may be given in evidence, except such as would support another action.

The case cited from *1 John. Rep.*, 298, is an action of the father for the seduction of his daughter, and she was not permitted to prove a promise of marriage, and for two reasons.

First. It was the ground of another action.

Second. The daughter herself had the right of action.

3 *Camp.*, 519, and 3 *Wils.*, 18, are not accessible to the Court, and have not been examined. This much for the authorities cited by the counsel for the plaintiff in error. The counsel for the defendant in error have cited 3 *Mass. Rep.*, 71, *Paul v. Frazier*, and *Boynton v. Kellogg* 189; 1 *John. Cas.*, 116, and 2 *Overton* 233. In the case of *Paul v. Frazier*, Chief Justice Parsons uses this strong language: "as the law now stands, damages are recoverable for a breach of promise of marriage; and if seduction has been practiced under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided; and we do not profess to be wiser than the law." In *Boynton v. Kellogg*, this law seems (322) not to be questioned. In the case of *Conn v. Wilson*, 2 *Overton*, 233, the Court recognize fully the authority of *Paul v. Frazier*, and *Boynton v. Kellogg*, above cited. In the case of *Johnston v. Caulkins*, 1 *John. cases*, 116, the evidence of seduction seems to have been admitted as a thing of course and without objection. Thus stands the law as we collect it from the authorities above cited by the counsel for the defendant in error: and we feel but little hesitation in deciding that the weight of authority is with the defendant in error. Independently of all authority, however, from adjudged cases, we feel prepared to decide that the law should be so held.

The argument attempted to be urged, that to allow the evidence in such cases will encourage seduction, can have no force. The only effect and the obvious effect must be to induce persons to execute their contracts of marriage, where seductions have ensued from them, for fear of being compelled to answer in damages, or the pain or ignominy which the breach of such contracts would bring upon the victims of their lust and fraud; nor is it a reason why the daughter should not be permitted to recover on the breach of a marriage contract for a seduction procured under cover of the contract, that the father may give it in evidence and recover in his action for the same seduction. Money at most can afford but a paltry and inadequate recompense for the loss of virtue and character to the child; or for the loss of the child's society, and the peace and happiness of the family, to the parent. They each sustain injuries peculiar to themselves, and for which each should have redress.

The second error assigned is, that the Court permitted the deposition of Oldham to be read to the jury. It is objected to as being irrelevant; the evidence with which it connects itself has not been stated; but in looking into the record, seems to us sufficiently clear to authorize the reading of it as one link in the chain of evidence given to establish the fact that the plaintiff never intended to perform his promise. The Circuit Court therefore committed no error in permitting it to be read.

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(323) The third error assigned is, that the Court below permitted evidence of general character of the plaintiff below to go to the jury. The case of *Boynton v. Kellogg*, above cited, and of *Johnston v. Caulkins*, establish that the Court did right.

Evidence of character before seduction is admissible in an action by the father for the seduction of his daughter; and there can be no reason why it should be excluded in an action by the daughter.

To enable the jury to measure the damages in such cases, the rank and fortune, character and conduct of the parties must be examined into.

The fourth error assigned, and the last to be considered, is, "that the Court refused to give the second instruction asked by the defendant below." The instruction prayed for was, "that no evidence of an offer to marry by the plaintiff had been given in this case." This instruction was properly refused. There was evidence from which the jury might well infer an offer to marry.

When the marriage was postponed with the consent of the father and daughter, about the 10th of September, the plaintiff promised to marry the defendant in a month or so, and afterwards, some time in October, which may well have been, after the expiration of a month from the date of the last postponement in September, the defendant stated in his presence, that she was ready to marry the plaintiff in error, and had made preparations for the occasion, &c. A plainer proposal could never be expected from a modest woman. Upon the whole matter, therefore, the judgment of the Circuit Court is affirmed with costs.

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143	562
3	323
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Hill v. Maupin.

ON ERROR from the Boone Circuit Court.

WASH, J., delivered the opinion of the Court.

(324) The only question presented in this case is, whether seduction procured under color of a contract to marry, can be given in evidence in an action for the breach of that contract to aggravate the damages. This has been settled in the case of *Green v. Spencer* just decided.

The judgment of the Circuit Court in this case is, therefore, affirmed with costs.

TOMPKINS, J., dissenting.

The statement of the case being made by the majority of the Court, I will pass it over to the only point on which I differ materially from them, viz: that evidence may be given in an action for a breach of contract of marriage, of seduction, and

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getting the plaintiff with child. It is admitted by the counsel for the defendant in error, that the authorities upon the subject of the admission of such evidence differ; against such admission he cites *Buck v. Shain*, 2 *Bibb*, 341, and very correctly shows that the case is not in point.

In favor of the admission he cites *Johnston v. Caulkins*, 1 *Johnson's Cases in Error*, 116; *Paul v. Frazier*, 3 *Massachusetts Reports*, p. 73; *Boynton v. Kellogg*, *ibidem*, p. 188; and *Conn v. Wilson*, 2 *Overton's Ten. Rep.* p. 233. In the case of *Johnston v. Caulkins*, the only questions decided by the Court were, whether in an action for breach of contract of marriage, the defendant was allowed to give in evidence in mitigation of damages the licentious conduct of the plaintiff, without any limitation as to the time he made the promise to her, or to the period of the proposed marriage, and that in such a case it is not necessary for the female plaintiff to prove a previous offer to marry the defendant. The case of *Boynton v. Kellogg*, was for a breach of promise of marriage and seduction. In the Judge's report of this case, it (325) does not appear that any evidence was offered of seduction, and the point decided in this case is, that in an action for a breach of promise of marriage and for seduction, the defendant shall not give in evidence the general bad character of the plaintiff, between the promise and the breach, in mitigation of damages. So far as the counsel for the defendant neglected to demur to this declaration, it may be admitted to be of some authority; and we are left to one of these conjectures, either that the defendant's counsel did not read the declaration, or that if he did read it he might know the plaintiff could give no evidence of the seduction, and therefore did not care to take the trouble of writing a demurrer, or he might think that the Court would sustain the declaration.

But in the opinion of the Judges, as delivered in the report, there is no allusion to the charge of seduction laid in the declaration. The case of *Paul v. Frazier*, 3 *Mass. Rep.* 73, is also an action for a single woman against one for seducing and getting her with child, under a pretence of a design to marry her. In this case Chief Justice Parsons arrested the plaintiff's judgment, declaring that the action could not be maintained. For he says she is a partaker of the crime, and cannot come into Court to obtain satisfaction for a *supposed injury to which she was consenting*. Here this case properly ended, the Chief Justice having decided the point submitted to him; but he thought proper to proceed and say, "it has been regretted at the bar that the law has not provided a remedy for an unfortunate female against her seducer. Those who are competent to legislate will consider before they provide this remedy, whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced in order to obtain pecuniary compensation." So far the Judge thinks it a subject too delicate and dangerous for even a Legislature to meddle with. But then he proceeds: "As the law now stands, damages are recoverable for a breach of promise of marriage; and if seduction has been practiced under color of that promise, the jury will undoubtedly consider it as an aggravation of damages."

(326) Thus the relief which it would be dangerous in his opinion for the Legislature of Massachusetts to extend to seduced females, Mr. Chief Justice Parsons supposes a jury would undoubtedly extend by considering the seduction in aggravation of damages in an action for a breach of promise of marriage.

Now it is apparent that this dictum of the Judge, so much at war with his decision in the cause, and with all his other declarations therein, is the only prop of the argument of appellee's counsel. For the case of *Conn v. Wilson*, 2 *Overton's*

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Tennessee Rep., is decided on the authority of this dictum of Chief Justice Parsons. I was about to add something about the action of assumpsit not lying when the consideration was illegal or contrary to the policy of the law, and to say that Courts could not consistently permit a plaintiff to give in evidence, to aggravate damages, an illegal consideration, or one contrary to the policy of the law, when an action on a consideration of such a character would not be entertained. For if it would lead to evil consequences to entertain actions where the consideration of the agreement is illegal or contrary to the policy of the law, most indubitably the consequences would be equally pernicious when a plaintiff is allowed to receive, by way of aggravation of damages, a consideration which is equally illegal and contrary to the policy of the law; but I will stop and not produce a single authority from any of the numberless elementary books on this subject. Nothing I could find in them would be more forcible than what Chief Justice Parsons himself says, when he speaks of the danger of a legislative provision in favor of seduced females. But I cannot repress the expression of my astonishment, that it should ever enter the head of so wise a man to trust to a jury the application of a remedy which he thought a legislative body could not safely provide. I will close by observing that the father or friend with whom the seduced female lives, can recover damages for the seduction, and that it is a rule of Courts not to grant new trials in such cases, because damages are exorbitant; but the liability of the defendant to have double damages to pay, I regard as (327) nothing compared with the immoral tendency of the practice of giving seduction in evidence, in aggravation of damages, in an action for a breach of marriage contract. In my opinion the judgment of the Circuit Court ought to be reversed.

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Decisions of the Supreme Court of Missouri,

BOWLING GREEN DISTRICT, APRIL TERM, 1834.

HAYDEN v. SLOAN.

Where the subject matter of a suit is as properly cognizable before the Circuit Court as before a Justice of the Peace, the plaintiff may have costs awarded him although he recover less than fifty dollars damages. (Note a.)

WASH, J., delivered the opinion of the Court.

Sloan, the defendant in error, brought his action of trespass for an assault and battery, committed by Hayden on him; laid his damages at five hundred dollars, got a verdict and judgment for \$9 16 1-2 cents, and had judgment awarded for his costs; to reverse which judgment for costs, Hayden has come with his writ of error to this Court.

The only point presented for the consideration of this Court is, whether the Circuit Court erred in giving judgment for the costs.

The counsel for the plaintiff in error relies upon the provisions of "an act establishing Justices' Courts and regulating the collection of small debts," passed February 21st, 1825. The first section of that act provides, amongst other things, that actions of trespass wherein the damages demanded shall not exceed fifty dollars, shall be cognizable before a Justice of the Peace. The thirty-fourth section provides that if any person shall hereafter commence a suit in the Circuit Court which is properly cognizable before a Justice of the Peace, although he may recover judgment in such suit, he shall not recover costs," but shall pay costs; and it is insisted that it is shown in this case by the finding of the jury, that the cause was properly cognizable before a Justice of the Peace, and that under the thirty-fourth section above cited, the costs should have been adjudged against the plaintiff below, and not against the (329) defendant. The counsel for the defendant in error relies on the eleventh and

Hayden v. Sloan.

twelfth sections of "An act concerning costs," passed January 26th, 1825, and on the fourth section of "An act to establish Courts of Justice, and prescribe their powers and duties," passed January 7th, 1825. The eleventh section of the act above cited, provides that when any action shall be prosecuted in any Court, the subject matter of which is cognizable before such Court, but the amount of debt or damages recovered shall be below the jurisdiction of the Court, the plaintiff shall recover no costs, but may have costs adjudged against him in the discretion of the Court. The twelfth section provides "that in all actions upon the case for slanderous words, trespass, assault and battery, if upon the trial of the issue or inquiry of damages, any damages be found for the plaintiff, the plaintiff shall recover his costs."

The fourth section of the act above cited, gives to the Circuit Court concurrent jurisdiction with Justices of the Peace in actions of tort, &c. The counsel for the defendant in error contends, and very correctly as it seems to this Court, that these statutes having been all passed at the same session of the Legislature, and having relation to the same subject, are to be taken together, and made effectual throughout provided they are consistent. That in this case the damages demanded gave the Circuit Court jurisdiction, and that the twelfth section of the act concerning costs, above cited, takes this case expressly out of the operation of the eleventh section of that act, and entitles the plaintiff to his costs, although the amount of damages recovered is within the jurisdiction of a Justice of the Peace. The subject matter of the suit was as properly cognizable before the Circuit Court as before a Justice of the Peace. The words *properly cognizable*, as used in the act organizing Justices' Courts, are to be considered to be equivalent to *exclusively cognizable*.

The judgment of the Circuit Court is therefore affirmed with costs.

- (a.) See *Jones v. Relfe*, 5 Mo. R., 542.
Talbot v. Greene, 6 " " 459.

(330)

SIMONDS v. PETTIBONE, ADM'R. OF PETTIBONE.

A. and B. hold a joint lien on a tract of land. B. assigned his part to C. on a piece of paper separate and distinct from the instrument by which the debt was secured. B. afterwards died, and A. administered on his estate. It was held that A., as administrator, was not bound to take notice of the assignment of B., his intestate, to C.

TOMPKINS, J., delivered the opinion of the Court.

Simonds complained of Levi Pettibone, administrator of Rufus Pettibone, that he had not paid to him a large sum of money which the deceased in his life time owed. He states that Rufus Pettibone in his life time, on the 12th February, 1824, by deed assigned to him for valuable consideration, the one half of a debt due from Risdon H. Price to him the said Rufus, and to Levi Pettibone, the administrator; that this assignment was known to the administrator and was frequently the subject of conversation between them: but that he did not, till the 11th day of November, 1829, exhibit his claim to the administrator. Letters of administration had been taken out by Levi Pettibone on 24th October, 1824.

The administrator in his answer, admits that he rendered an account of a debt due from said Price to himself and the deceased, such as set out in the bill; but says that Price in reality owed nothing, and explains the matter thus: that he and the deceased had, at the time of the assignment in the bill mentioned, a joint lien on a tract of land which Price had purchased, after their lien had attached, and that believing that Price would pay them the money, secured by such lien, he had so reported the claim and had always in common parlance called it a debt due from Price. He admitted that he had collected the money, but asserted that he had by order of the County Court, paid over to such creditors as had come in, all the funds of the estate and that it was insolvent. The assignment was made on a separate piece of paper and not on the instrument by which the debt due to Levi and Rufus Pettibone was secured; and distribution of assets had been made by order of the County Court. The question (331) to be decided is, was the administrator as such, accountable to Simonds for the money collected on the debt due from Price so called.

By our statute, bonds, bills and promissory notes for property or money, are assignable: and the assignee has as full control of the papers so assigned as the payee before assignment had; but here was a lien on a tract of land, or at most a demand on Risdon H. Price, belonging to two persons, the one half of which is on a separate piece of paper, assigned to the complainant by one of the persons only.

The other person interested in this demand, administers on the estate of his partner in the demand, and it is insisted that he as administrator, is bound to take notice of the assignment by his intestate. Our statute of assignment certainly does not aid the complainant: and as the assignment by the intestate did not give the assignee the right of the possession of the evidence of the demand on Price so called, no reason can be seen why the administrator was bound to notice the demand of the complainant more than that of any other creditor.

Cleaveland and Marks v. Davis.

The complainant having failed to exhibit his demand to the administrator within three years after letters of administration were taken out as required by law, we are of opinion that his demand is barred. The decree of the Circuit Court is, therefore, reversed.

CLEAVELAND, TO USE OF CASE & MARKS, v. DAVIS.

1. Admissions made by a person, after he has parted with his interest in a bond or note, cannot be given in evidence in prejudice of the assignee. (Note a.)
2. An instruction to the jury, to decide between the parties according to what they might think was right and equitable, is too indefinite to be sustained by the act of Jan. 18, 1831.

M'GIRK, C. J., delivered the opinion of the Court.

(332) Cleaveland, to the use of Case and Marks, brought an action of debt on a bond, before a Justice of the Peace, where judgment was rendered for Davis. An appeal was taken to the Circuit Court. On the trial in the Circuit Court, the plaintiff gave his bond in evidence. The defendant then proved by John Chandler, that after the suit was brought Cleaveland told Chandler, the bond sued on was given to secure the payment of the sum therein mentioned for a clock, sold by Cleaveland to Davis. This testimony was objected to by the plaintiff's counsel. The Court permitted the testimony to go to the jury. The defendant gave in evidence a written agreement, not under seal, made by Cleaveland of the same date of the bond sued on, to Davis, by which agreement Cleaveland acknowledged he had sold a clock to Davis, which he warranted to be a good time piece for two years, and if it should fail to be a good time piece, he promised to make it good by repairing it or putting another in its place. This paper was objected to as evidence, but admitted by the Court. The defendant also proved that the clock ran about five months of the time and then failed to run and keep time.

There was no evidence that Cleaveland ever came to repair the clock, or that he put another in its place.

On this state of testimony, the Court instructed the jury, that they must decide between the parties according to what "they might think was right and equitable." The jury found a verdict for the defendant.

A motion was made by the plaintiff for a new trial and overruled.

The first question to be considered is, did the Court err in admitting Chandler's testimony. We are of opinion the Court erred on this point. The record shows that

Cleaveland and Marks *v.* Davis.

before the suit was brought, Cleaveland had endorsed this bond away to Case and Marks.

The law is clear enough, that no admissions made by a person after he has parted with his interest in a bond or note, can be received in evidence in prejudice of his assignee. This principle of law applies to this testimony. The testimony should (333) have been excluded from the jury. When this evidence is excluded, there is no evidence to show that the consideration of the bond sued on, was the clock mentioned in Cleaveland's agreement of warranty. The error above is sufficient to reverse the judgment. There is, however, another point, on which the counsel on both sides are anxious to have an opinion; which point arises out of the instructions given by the Court to the jury.

The instruction given was, that the jury should decide between the parties according to what they might think was right and equitable. To sustain the correctness of this instruction, Mr. Jamison for Davis, relies on an act of the General Assembly, passed 18th January, 1831, which act provides, that hereafter it shall and may be lawful for any Justice of the Peace within this State, when any cause is pending before him, to hear and determine all such actions according to equity and good conscience, in a summary way, &c., and it is hereby declared to be the duty of such Justice to give judgment according to right and justice between the parties. The second section of the act provides, that when an appeal is taken to the Circuit Court, it shall give judgment and try the cause in the same way as above provided. Mr. Jamison contends that this act not only justifies the instruction the Court gave, but also warranted the Court in letting the unsealed instrument of Cleaveland go in evidence to show the consideration of the bond had failed.

Messrs. Chambers, Wells and Campbell contend on the other side, that this act can have no effect, without farther legislation. That the act is merely declaratory of the old law; that to give the act the effect contended for by the other side, would be to erect every Justice of the Peace into a Chancery Court: that this construction will in effect repeal all laws respecting Justices of the Peace, will let them loose from all rules of law, substituting therefor, each Justice's own private notions of right and wrong, and that it is not to be supposed the Legislature could intend to do this.

We hold the true construction of the act is this:

First. That by it the rules of evidence are not in the slightest degree altered. (334) That if before the passage of the act, parol evidence on a trial at law could not be admitted to show that the consideration of a bond had failed, such evidence cannot be admitted since, to that point; that evidence before deemed by law incompetent, is still so. We hold that the Justices are, since the passage of the act, as much bound to proceed according to the rules of law, both in admitting testimony and giving judgment, as they were before the passage of the act, with this single exception, that when testimony which is competent and relevant shall be heard by him, shall raise a defence which the strict rules of law would not admit to be a defence in law, yet if such defence would be good in equity and good conscience, it shall be allowed, disregarding the strict legal objections. What will be a good equitable defence, when legally proved, is now about as well known to our jurisprudence, as it is certain what is a good legal defence.

The statute requires that the cause shall be heard and determined according to equity and good conscience, and then it says, judgment shall be given according to right and justice. What the Legislature mean by requiring the cause to be heard and

Cleaveland and Marks v. Davis.

determined according to equity and good conscience, is not entirely certain. We cannot believe they intend the cause should be proceeded in according to the known course in Chancery proceedings. That course requires pleadings the defendant must answer on oath, &c., but by the act there shall be no pleadings. We are of opinion that by the above words, the Legislature require that when a Justice is trying a cause if legal testimony shall raise an equitable defence, such testimony shall be considered of, for the purpose of establishing such defence; and if in the opinion of the Justice such defence is proved, it then becomes his duty to determine on such defence, whether in equity and good conscience it is sufficient to defeat the plaintiff's claim. And in making this determination he is to be governed by the equity law of the land. And it is not sufficient that his determination should be honest and upright; but it (335) must be according to the known and established rules of right and wrong, fixed by the general laws of the land for the ascertainment of every citizen's right. If it were not so, but the Justice's mere notion of equity and good conscience is to be the rule of decision with him, then his judgment could not be reversed by a superior tribunal. Upon this principle the Supreme Court could not and ought not to reverse one of these cases tried and adjudicated on by the Circuit Court, for the law requires that Court to proceed in such case in the same way required of the Justice. If then the Circuit Court should give a judgment contrary to the equity and Chancery law of the land, yet it would be good if it appeared that the judgment was according to his view of equity and good conscience; and that would be the only point of inquiry. We cannot believe that the Legislature of the country intend to feed the citizens on the mere husks and chaff of the law, instead of the substance, nor do we think they intend to substitute the variant notions of equity and good conscience of the many Justices of the Peace in the State, in place of the known and fixed rules of equity known to the law of the land. The instructions given are too indefinite to be sustained. The judgment is reversed, and cause remanded for a new trial.

(a.) See same case, 4 Mo. R., p. 206; Porter and Moons v. Rea, 5 Mo. R., p. 48.

HAYS v. THOMAS.

1. In an action of trover for the value of a horse, witnesses stated that the horse was worth from fifty to seventy dollars. A verdict was found for thirty dollars. It was held that on application a new trial should have been granted.
2. In an action of trover for the value of a horse, witnesses stated that the horse was worth from fifty to seventy dollars. A verdict was found for thirty dollars. The Court gave judgment against the plaintiff for costs. It was held that under the evidence, the Circuit Court did not exercise its discretion soundly in adjudging the costs against the plaintiff.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of trover brought by Hays the (plaintiff in error) against (336) Thomas the (defendant in error), in the Montgomery Circuit Court, to recover the value of a horse. Hays got a verdict and judgment for thirty dollars, and thereupon the Circuit Court gave judgment against the plaintiff for the costs of suit, to reverse which judgment for costs, Hays now prosecutes his writ of error in this Court.

The plaintiff in his declaration has laid his damages at one hundred dollars. The witnesses who were examined on the trial in the Circuit Court, stated the value of the horse to be from fifty to seventy dollars. Fifty dollars was the lowest value named by any of the witnesses. How the jury arrived at the conclusion that the horse was worth only thirty dollars, it is difficult to conceive. The plaintiff made a motion for a new trial, because the verdict of the jury was against evidence, which was overruled, and judgment of the Court thereon excepted to. It seems to us very clear that the Circuit Court erred in refusing to grant the plaintiff a new trial, and for that error the judgment would be reversed and the cause remanded; but that the plaintiff now waives his right to a reversal for that cause, and presents for the consideration of this Court the single question, whether the Circuit Court, under the provisions of the 11th section of the act concerning costs, *Rev. Code*, page 227, exercised its discretion soundly in adjudging the costs against the plaintiff? The words of the section are, "that where any action shall be prosecuted in any Court, the subject matter of which is cognizable before such Court, but the amount of the debt or damages recovered shall be below the jurisdiction of the Court, the plaintiff shall recover no costs, but may have costs adjudged against him, in the discretion of the Court.

The evidence preserved on the record, and which in the estimation of this Court would have entitled the plaintiff to a new trial, is abundant to satisfy us that the discretion of the Circuit Court, under the provisions of the 11th section above cited, was not soundly exercised, and that the costs ought not to have been adjudged against the plaintiff under the provisions of the act above cited. The plaintiff having re-(337) covered less than fifty dollars, could recover no costs. The judgment of the Circuit Court, for the damages found by the jury, is therefore affirmed; and its judgment in awarding costs against the plaintiff, is reversed with costs.

HILL v. YOUNG.

1. Justices are allowed the whole of the first day of a term of the Circuit Court to make return of a writ of *certiorari*. A motion therefore, to dismiss a writ on the first day, is premature.
2. When the writ of *certiorari* and the record are in Court, the Justices will be allowed to amend.
3. Any decision, order or decree of the Circuit Court, which puts an end to the proceedings between the parties to a cause in that Court, may be reversed upon appeal or writ of error.

WASH, J., delivered the opinion of the Court.

Hill brought an action of forcible entry and detainer against Young, before two Justices of the Peace of Lincoln county, and on 24th June, 1833, got a verdict and judgment for the recovery of eighty acres of land. After the adjournment of the Justices' Court, Young made application to the Justices separately at their respective homes, for a new trial, to which they separately assented. On the 12th of July thereafter, the Justices met and granted a new trial, and appointed the 3d of August for the time of trial. On the 20th of July, the Justices issued a notice to Hill that a new trial had been granted; which notice does not appear to have been served on Hill.

On the 3d of August the cause was called for trial, and Hill not appearing, judgment of non-suit was entered up against him, also a judgment for the costs. On the same 3d of August, Hill filed a bond for the costs with the Clerk of the Circuit Court and obtained a writ of *certiorari*, which seems not to have been executed. On the 19th of August, 1833, a second writ of *certiorari* was sued out and served on the Justices. At the September term of the Circuit Court, and on the first day of the (338) term, the Justices returned the writ, which had been served on them, and filed a record of their proceedings with the Clerk of the Circuit Court, without connecting the record with the writ, or stating that the record was returned in obedience to the writ. On the first day of the term, the counsel for Young moved the Circuit Court "to dismiss said *certiorari* and proceedings under it, because the Justices of the Peace to whom the said writ was directed, and on whom it was served by the Sheriff, have failed to make return thereon." On the same day the counsel for Hill, regarding the return made by the Justices as sufficient, proceeded to assign his errors. He moved the Court also for the Justices to have leave to amend their return. It does not appear from the record whether the motion to dismiss the writ of *certiorari*, or the motion for leave to amend the return, was first made. The motion to dismiss stands first in order in the record, and was sustained, and that to amend overruled. On the following day the counsel for Hill moved the Circuit Court for a writ of *mandamus* to compel the Justices to make return, &c., which was also overruled. The judgment of the Court upon these several motions was excepted to by Hill's counsel, and Hill appealed therefrom to this Court.

Matson v. Dickerson.

Upon this State of facts, a variety of questions have been raised, which need not now be decided. Such as seem material we will endeavor to dispose of.

It is urged by the counsel for the appellee, that it is to be collected from the record, that the motion to dismiss was made first, and when in truth no record or paper purporting to be a return by the Justices had been filed. The answer to this is, that the Justices had the whole day in which to make their return; and that the return having been made during the day, he must have been too early with his motion to dismiss. It is also urged that the writ of *certiorari* being separated from the record of the proceedings before the Justices, and not referred to by them as the command under which they make return of their proceedings, it must be regarded as if it had never been returned. To this it may be answered, that the addition of a word (339) or two by way of amendment, under the motion for leave to amend, would have obviated the objection and made the return full and perfect.

The motion to amend was made on the first day of the term. The writ and the record, by which the Justices might have amended, were in Court, and the motion was improperly overruled.

It is further contended by the counsel for the appellee, that no appeal lies but upon a final judgment in the Circuit Court, upon the merits of the matter in dispute between the parties litigant. A different doctrine has been held by this Court since the case of Chambers and Astor, which is relied on in support of that position; and it is now settled that whatever decision, order or decree of the Circuit Court, puts an end to the proceedings between the parties to the cause in that Court, may be reversed upon appeal or writ of error. This view of the subject makes it unnecessary to notice the motion for a *mandamus*. In the consideration of this Court, the return by the Justices was good in substance, and sufficient to authorize the Circuit Court to proceed in the cause. The judgment of the Circuit Court is therefore reversed with costs, and the cause remanded to said Court to be reinstated and proceeded in conformably with this opinion.

MATSON, ADM'R, &c., v. DICKERSON, GUARDIAN, &c.

A writ of error will not lie from the Circuit Court to the County Court:

M'GIRK, C. J., dissenting.

TOMPKINS, J., delivered the opinion of the Court.

The County Court of Pike county had entered up a judgment against Matson as administrator, in favor of the distributees of Matson's intestate, from which judgment

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each party appealed to the Circuit Court, that Court dismissed each appeal for want of prosecution. Dickerson, the appellee, then procured a *sci. fa.* to be issued from (340) the County Court, requiring Matson, the appellant, to show cause why execution should not issue against him. Matson then, by C. H. Allen, his attorney, moved the Court that the final settlement of his administration be opened, and that he be admitted to make a new or further settlement thereof upon a certain agreement, in writing of the said Matson and Dickerson, and upon the discovery of certain credits which were not recollect'd at the final settlement of the estate; and that no execution be issued on the *sci. fa.* until the matter be heard by the Court. The motion was overruled. From this judgment and decision of the County Court, Matson appealed to the Circuit Court, but failing to prosecute his appeal, Dickerson obtained an execution, and Matson having obtained a writ of error from the office of the Clerk of the Circuit Court, and the Judge of that Circuit directing such writ to be made a supersedeas, the cause was brought into the Circuit Court. On motion the cause was dismissed by the Circuit Court for want of jurisdiction, and Matson appealing brought it into this Court.

For the plaintiff in error it is contended that the Circuit Court having, by 8th section of the 5th article of the Constitution, a superintending control over such inferior tribunals as the Legislature may establish, and the County Court being an inferior jurisdiction so established, the Circuit Court has a right to exercise that control by writ of error, even though the statute should deny it the use of such writ. And it is likened to the cases in which this Court took by aid of the writ of error, appellate jurisdiction over cases decided in the Circuit Court, when the amount in controversy was less than one hundred dollars, although the statute had limited its appellate jurisdiction to that sum. On the other side it is contended that by the 2d section of the 5th article of the Constitution, this Court having appellate jurisdiction over the Circuit Court, is therefore only authorized to use the writ of error when the statute denies it, and that the superintending control given to it by the 3d section of the same article, is to be exercised only by writs of *habeas corpus*, &c., and to this (341) opinion a majority of this Court inclines. The 6th section of the act to establish Courts of Justice, &c., see *Laws Mo.*, p. 270, gives the Circuit Court its appellate jurisdiction, and the 77th section of the act concerning executors and administrators, directs how an appeal shall be taken. In all cases it must be done at the term where the decision is made, affidavit must be made, &c., and then this appeal operates as a supersedeas, in no other matter relating to the duties of executor or administrator, or the administration of the estate, than that from which the appeal is specially taken. In all sums over two hundred dollars, the County Court and the Circuit Court have concurrent jurisdiction, and the plaintiff if he will sue in the Circuit Court, by the same 8th section giving the Circuit Court a superintending control over the inferior tribunals to be established by the Legislature, a like control is given to that Court over the Justices of the Peace of its particular Circuit, and yet it never was pretended that a writ of error lay from the Circuit Court to the decisions of the Justices of the Peace. The Justice's Court is certainly no Court of record, and it may be said that the Legislature was under no obligation to make that inferior tribunal, called a County Court, a Court of Record; and had it not been a Court of Record, it is imagined that no one would have contended the writ of error would lie. What the law-maker could deny by indirect means, it may equally deny in a direct manner. In all cases of the settlements of estates of deceased persons,

Blanton v. Knox.

the statute provides that the appeal shall be taken at the term the decision was made, and at no other term. Nor are we inclined to think it an unreasonable law in the general. But it seems great evil would be the consequence of allowing the writ of error to go in such cases as the present.

The case of Town and the Clerk of the Supreme Court has been relied on. Town is there said to have applied to the Clerk of the Supreme Court for a writ of error, to bring "up a certain matter there decided and adjudged, wherein by law an appeal does not lie to the Circuit Court," and the Clerk refusing to issue the writ, application was made to this Court to compel him; but this Court refused, and intimated a belief that a writ of error would lie from the Circuit Court to the County Court. This is no more than a dictum of the Court, in a case too where no appeal lay. Here the appellant had neglected to avail himself of his right to appeal. The judgment of the Circuit Court is therefore affirmed.

M'GIRK, C. J., dissenting.

I do not concur in this opinion. I am of opinion that a writ of error will well lie from the Circuit Court to the County Court. I am of opinion, however, that if it were adjudged to lie in this case, the party could get nothing by it. I understand on this last matter the Court all think alike.

3	349
36a	319
3	342
129	657
3	342
72a	562

BLANTON *v.* KNOX.

A contracted to hire a negro to B for one year. The contract was not reduced to writing. The negro was delivered at the time agreed on, and the year's services performed. This contract was held not to be within the 1st section of the act defining the effect of contracts and promises. It was further held, that proof of an acknowledgment of an unwritten contract within the year would not take it out of the statute. (Note a.)

M'GIRK, C. J., delivered the opinion of the Court.

An action of debt was brought before a Justice of the Peace for \$42. The plaintiff had judgment. The defendant appealed to the Circuit Court, where the plaintiff again recovered judgment. The record shows the case to be, that on the 10th day of Sept., 1832, Blanton hired to Knox a negro woman for one year, the service to commence on the 14th of the same month, when Blanton was to deliver the slave into the possession of Knox. Knox was to clothe the negro. Blanton delivered the possession of the woman to Knox on the day specified. The services were performed.

Blanton v. Knox.

There is some evidence to show that on the 22d of the same month, Blanton and (343) Knox rehearsed the contract in the presence of each other before witnesses, when both acknowledged the contract to be as above stated. This contract was not in writing.

On the trial the counsel for Knox prayed the Court to instruct the jury, that unless they found this contract was in writing, they must find for the defendant; which instruction the Court refused, but instructed the jury that if they found the contract was not in writing, yet if they found that the defendant acknowledged the contract within the year from the end of the service, then the case would not be within the statute of frauds, though they should find the contract was not in writing. To the refusing to give the instruction asked, and to the giving the instruction given, the defendant excepted.

The question raised in this case is, whether the contract is within the 1st section of the act defining the effect of contracts and promises; *Rev. Code*, 214.

The words of the act relating to this subject are, "that no action shall be brought upon any agreement, that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith."

It is insisted by Mr. Hunt for Knox, that this statute protects him from the payment of the money promised for the service, and to prove this more fully he cites *Chitty on Contracts*, 208-9, where *Chitty* refers to a case reported in 1 *B and A*, 722, where it was decided that no action lay on a contract for a year's service made on the 27th of May, to commence on the 30th June following, unless it be in writing. Messrs. Campbell and Wells, for Blanton, cite and rely on *Chitty* likewise, p. 109, where *Chitty* refers to 11 *E*, 152, and 1 *B and A*, 727, where it seems to have been decided that an action may be maintained on an unwritten contract for the sale of goods to be delivered within a year, though the payment for the goods was to be made 18 months after the contract was made, for this reason says *Chitty*, because in (344) such case, all that is to be performed on one side, namely the delivery of the goods, is to be done within the year. None of these authorities are within our reach at this time. If *Chitty's* report of these cases is correct, we are of opinion that the last case cited by him will apply to this case and will enable Blanton to recover. In that case, all that was to be done on one side was to be done within the year, namely the delivery of the goods; so in this case, all that was to be done by Blanton, was to deliver the slave to Knox on the 14th of September, three days after the agreement was made. By the agreement, as soon as the slave was delivered, Blanton's control and right of control ceased to exist, till the year expired. We view his part of the contract completed when the delivery was made. He did not bargain that the slave should work from that day through the whole year.

He had no right to give any orders to the slave as to that matter. The enforcement of service was the business of Mr. Knox. We think the case cited from *B and A*, by Mr. Hunt, differs from this case, in this: that there the work was to be performed by the person who made the contract. The essence of the thing to be done was continued service to the end beyond the year. Here the substance of the thing to be done on the part of Blanton was, that he would, three days after the agreement was made, deliver to Knox the slave to be possessed, commanded and worked by him for the space of a year. Suppose Blanton, after the possession came to Knox,

Bartlett *v.* Glendy.

had taken the negro away from Knox, what would be Knox's remedy? Could he sue for a breach of contract, or must he bring trover or some such like action to regain possession, or damages for the wrong done? It seems to us he must. If so, it proves that Blanton's undertaking was executed when he delivered the slave. The Court below decided that the proof of an acknowledgment of the contract within the year took the case out of the statute. If the proof had been so, this would not be law, and that decision was wrong. But the judgment must stand because it is for the right party, for the reasons above mentioned. The judgment is affirmed with costs.

(a.) See Pitcher *v.* Wilson, 5 Mo. R., p. 48.

(345)

BARTLETT *v.* PETTUS AND GLENDY.

1. When application for relief against a judgment at law is delayed, it furnishes a presumption against the equity of the defence set up.
2. A bill stating that a bond had been executed in consideration of the transfer of sundry small accounts, and a small stock of hogs, and that the accounts had not been collected in consequence of insolvencies, and the want of proof by reason of the absence of the obligee in the bond, who had gone to a foreign country, and collections previous to the transfer of the accounts, contains no equity.
3. The bill should have shown that the obligor agreed to make up losses by insolvency, and to remain in the country to prove the accounts.

TOMPKINS, J., delivered the opinion of the Court.

Bartlett, on the 10th of February, 1832, filed his bill against Glendy and Pettus, complaining that on the fifth day of March, 1829, he made his bond to said Glendy, for the sum of two hundred and twenty-five dollars, and that said Glendy some time after left this country, and as he is informed and believes now resides in some part of South America; and that afterwards a suit was instituted in the Circuit Court of Marion county against the complainant on said note, in the name of said Glendy for the benefit of said Pettus, and that at the October term of the Circuit Court, for the year 1831, judgment was rendered against him for the amount of said note, &c., and that execution has been issued. He further stated that the consideration of the said bond was, sundry small accounts and claims which Glendy represented to him to be good, and a small stock of hogs, amounting in the whole to the nominal sum of three hundred dollars and upwards; but that owing to insolvencies and collections made by Glendy previous to the transfer, and the want of proof occasioned by Glendy

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leaving the country, the said accounts had proved unavailing, and that he had not been able to obtain any part of the stock of hogs: then alledging that the consideration had wholly failed, and that he was without relief at law, because Glendy was insolvent, and the consideration of the note on which he was sued was known only to him. Relief was prayed and an injunction was granted. Pettus answered, denying that he had any knowledge of the consideration of the bond on which Bartlett (346) had been sued, and on motion the bill was dismissed.

When an injunction is applied for, the applicant should be diligent. The complainant does not tell when the action on the bond was begun; but he tells us that it was more than three months after judgment was rendered against him, and not till the Sheriff had received the execution and begun to harass him for the amount recovered that he began to bestir himself to find relief in equity; but when he comes into the Court of Equity what has he to say why execution should not issue?

He had given his note for two hundred and twenty-five dollars in consideration of sundry small accounts and claims, and a stock of hogs transferred to him by Glendy, all amounting to upwards of three hundred dollars. But he says, that owing to insolvencies and collections made by Glendy, previous to the transfer, and the want of proof in consequence of Glendy's absence from the country, the accounts had been wholly unavailing. He appears to have been buying a bargain from Glendy, and giving a note of two hundred and twenty-five dollars for accounts, claims, and hogs, amounting to upwards of three hundred dollars, perhaps three hundred and ninety, or more. If, then, it is a part of the agreement that Glendy should make good what might have been lost by insolvencies, it should have been so stated in the bill; and if it were also a part of the agreement that Glendy should stay in the country to furnish him proof of the accounts sold to him, that too should have been stated. But he has not even told us that any thing was lost by insolvency. He says that owing to insolvencies, &c., the accounts had proved unavailing. The hogs too, it seems, have proved unavailing, and we are equally uninformed of the liability of Glendy on that account. We are decidedly of the opinion that the injunction should not have been granted, and that the bill was properly dismissed. The decree of the Circuit Court dismissing the bill is therefore affirmed.

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SWAIN v. GILBERT ET AL.

3	347
103	499
3	347
137	579
3	347
153	814

The proceedings under the statute of wills, to contest the validity of a will admitted to probate by the Court of Probate, must be at law and not in equity.

M'GIRK, C. J., delivered the opinion of the Court.

This is an appeal from the Circuit Court of Pike county, sitting as a Court of Chancery. Sometime heretofore Samuel Gilbert made his last will and testament duly attested, and died. The will was presented to the Probate Court, proved, and letters testamentary were granted; Swain and wife presented their petition to the Circuit Court as a Court of Chancery, to set the will aside. The defendants demurred to the bill or petition, on the ground that the petition should have been presented to the law side of the Court, as a Court of law, and not as a Court of Chancery. The Circuit Court sitting in Chancery, sustained the demurrer and dismissed the petition.

The only question for our consideration is, whether the proceeding authorized by our statute should have been a proceeding at law, or a proceeding in Chancery.

We are of opinion the proceeding should have been at law. We are not able to see any distinction between this case and the case of *Lyne v. Guardian et al*, 1 Mo. Rep. 410; that was a case exactly like this: in that case the question involved in this was fully considered. It was there decided that the party must proceed at law to set aside a will which has been admitted to probate by the Probate Court. We have seen nothing in the argument of this case to warrant us to overrule that decision.

The judgment of the Court below is affirmed with costs.

3 348
123 513

(348)

MYERS v. WOOLFOLK.

1. An affidavit made by an appellant in a Justice's Court in these words, viz : "That he did not appeal, but because he was injured by the judgment of the Justice," is good in substance.
2. In the proceedings of Justices' Courts, substance and not form is regarded.
3. A warrant was issued under the 7th section of the act regulating Justices' Courts, and served, not by arresting the body, but by reading as in case of an ordinary summons, and on the non-appearance of the defendant a judgment by default was rendered against him. Held, that under such service the defendant might appear and defend : that he had all the benefit of the process the law contemplated : that the arrest of the body is designed for the benefit of the plaintiff which he may waive ; and that if the defendant, after the judgment by default, take the cause to the Circuit Court, he is precluded from any objections to the regularity of the proceedings, the law requiring that on appeals from Justices' Courts, a trial *de novo* shall be had in the Circuit Court on the merits, without regard to the irregularities and informalities of the Justice.
4. An affidavit is essential to give to the Circuit Court jurisdiction of an appeal from a Justices' Court.
5. Where it appears that there is an appeal from a Justices' Court, regularly in the Circuit Court, the Court must try it, unless there was no legal cause before the Justice.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action commenced by Myers v. Woolfolk before a Justice of the Peace. The plaintiff, upon affidavit, obtained a warrant under the provisions of the 7th section of an "Act establishing Justices' Courts, and regulating the collection of small debts," *Revised Code*, p. 474. The Constable instead of arresting the defendant and bringing him forthwith before the Justice, read the warrant to the defendant in the mode pointed out for serving a summons, and made his return of service as directed in the case of a summons, the defendant having failed to appear, on the return of the warrant, judgment by default was entered up against him. Five days after the judgment, the defendant moved for a new trial, which was refused ; and four days thereafter he prayed an appeal, which was granted. In taking his appeal to the Circuit Court, the defendant instead of following the form of affidavit given in the statute, made oath "that he did not appeal, but because he was aggrieved by the judgment of the Justice." In the Circuit Court, Myers moved to dismiss the appeal, for the insufficiency of the affidavit, and Woolfolk moved to set aside the judgment of the Justice and to dismiss the appeal, because there was no sufficient service of the warrant, and because judgment by default was rendered against the defendant by the Justice before he had jurisdiction of said defendant. The Circuit Court reversed the judgment of the Justice and dismissed the appeal, thereby indirectly overruling the objection taken to the sufficiency of the affidavit. The opinion of the Circuit Court in sustaining the motions made by Woolfolk, and in overruling those

Myers v. Woolfolk.

made by Myers, was excepted to, and its judgment thereon appealed from to this Court.

For the plaintiff in error it is contended by Mr. Porter, that the Circuit Court erred,

First. In not dismissing the appeal for the insufficiency of the affidavit; and

Second. In reversing the judgment of the Justice for want of sufficient service of the warrant, and dismissing the cause.

The form given in the statute is clear and concise, and it is certainly best to adhere to it; we think, however, the affidavit is good in substance, and in proceedings before Justices of the Peace, substance only and not form is to be regarded. There is, therefore, no error in the judgment of the Circuit Court on this point.

On the second point we hold the law is with Myers. A warrant or capias is intended by the law to effect two objects, the first is to give the party notice of the suit, so that he may not have his right adjudicated on, without having an opportunity to defend himself; the second object is, that his body may be secured by being kept in custody or by giving bail to answer the plaintiff's execution, if he shall recover judgment; this latter benefit is one entirely for the benefit of the plaintiff. The defendant had the benefit of the process so far as the writ was intended for his benefit. He might well under this service have claimed the right to appear and defend himself. If he did not do so, he ought not now to be allowed to say he never had an opportunity to defend or to be heard. When he brought the cause to the Circuit Court he could not then complain of the want of an opportunity to defend. The law requires that there shall be a trial *de novo* on the merits, in the Circuit Court when an appeal comes there, disregarding all irregularity and informality which took place before the Justice. See the act of the General Assembly of 1831 on this subject, which says (sess. act 48, section 3) that when an appeal shall be taken from the judgment of a Justice of the Peace to the Circuit Court, no objections as to the proceedings of such Justice shall be valid, but the Court shall proceed to try such cause on its merits.

If in this case there had been no affidavit, there would not be any appeal lawfully in Court, that being essential to constitute the appeal.

But when the appeal once is found to exist in Court, the Court must try it, unless indeed there should be a case where no legal cause was ever before the Justice or where the process did not run in the name of the State. For these reasons we are of opinion the judgment of the Court below is to be reversed. The cause is remanded with instructions to that Court to reinstate the case and proceed to trial.

TOMPKINS, J., dissenting.

In my opinion the judgment ought to be affirmed. The Justice never had any jurisdiction of the cause. The Constable returned that he had served the warrant by reading it, and the Justice enters on his docket that the defendant not appearing, judgment by default was entered against him. The case of *Charless v. Marney* cited by Myers' counsel, does not support his argument. In that case (see 1 vol. *Mo. Decisions*, p. 537) it was decided that the summons not running in the name of the State, the proceedings before the Justice was properly set aside, and sent the cause back to be tried in the Circuit Court; but it was not then contended that the defect in the writ deprived the Court of jurisdiction; want of jurisdiction was one point certainly, but that point was attempted to be sustained, because it did not appear on

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(351) the face of the summons that the sum sued for was within the Justice's jurisdiction; and the Court decided that it need not necessarily appear on the writ that the demand was within the jurisdiction of the Justice, and therefore reversed the judgment of the Circuit Court dismissing the cause. It has been since decided that if the summons do not run in the name of the State, the Justice has no jurisdiction. In like manner I hold that if the defendant be not brought before the Justice, he has no jurisdiction of his person, and can give no judgment when the process is a warrant as in the case now under consideration; Myer's counsel calls this an irregularity. When the Justice in the case of Charless and Marney gave judgment for the plaintiff, the return of the summons being insufficient, that judgment was on that account irregular, and that irregularity might have been cured by the appearance of the party to defend before the Justice; but not so as to a defect in the summons which alone could give him jurisdiction; in such case the proceedings are said to be void, not irregular. Now if a Justice can give a judgment on a return similar to that now before the Court, I ask why he cannot give one without issuing any warrant? But it is said the plaintiff had a right to waive the law in his own favor requiring the body of the defendant to be brought into Court. True; but has he a right to waive the right of the defendant to be present and hear why judgment goes against him? The Constable, it is true, returns that the defendant was summoned, and it is said he might have come if he chose. For any thing the Justice knew, the defendant might have been sick and unable to attend; but should any one suppose the Justice was careful to inform himself on this point before he entered up his judgment, I answer that the Constable's return on the warrant, and whatever else he might have told the Justice, are equally inadmissible evidence to prove these facts. The Constable's duty was to return that he had taken the body of the defendant, and had him before the Justice; or that he had not done so, and the return which he made being different, is in my (352) opinion no evidence even that the defendant had been seen by him. It is asked if the Justice can render a judgment against an absent defendant, when the process is a summons, why not when it is a warrant? The ready answer is, that the law has commanded the Justice of the Peace to have him present, and this answer is enough: for as his power to give judgment is given by the statute, so in giving it he must conform to the provisions of the statute; but I see a substantial reason why a judgment should not be rendered against an absent defendant when suit is commenced by warrant, independent of any legislative mandate. When the process is a summons, the defendant is allowed at least six days to prepare for trial; in that time if he even be sick and unable to travel, he may employ an agent, and do other business preparatory to the management of his cause; but when the process is a warrant, he has no time allowed to do such business, and therefore is the Constable very properly required to bring him into Court: and as every man ought to be heard before his cause is decided, I think the Justice has no right to dispense with what the law required him to do in this case; but the act of Assembly concerning Justices' Courts, passed 18th January, 1831, requires that no objection as to the proceedings before the Justice shall be valid. I hold that every thing done before the Justice is void, and it is as if there had been no proceedings at all; and indeed it appears to me that if the Justice be allowed to proceed on such a return as this, that the issuing of a warrant is a nullity, and the Justice might with as much propriety enter up a judgment against the defendant, without pretending to notify him of the plaintiff's claim. In the rest of the opinion of the majority of the Court I concur.

3 353
38a 640

(353)

BLAIR v. CALDWELL.

1. A certificate by a Judge of another State, authenticating a record under the act of Congress, in these words, "I certify that the certificate of the Clerk is in due form of law," is sufficient.
2. In an action on a foreign judgment if it appears from the record that the judgment has been satisfied, it will be a variance from the declaration.
3. When property sufficient to satisfy an execution is levied on, it is a satisfaction of the judgment.
4. In an action on a judgment, if the record contain a bill in Chancery, filed by the defendant against the plaintiff, the defendant will not be permitted to read the bill in evidence.
5. If it appears from the record of a judgment that its payment has been enjoined, and no disposition of the injunction appears, the objection will be fatal in an action on the judgment.

M'GIRK, C. J., delivered the opinion of the Court.

An action of debt was brought by Blair against Caldwell and Alexander. The plaintiff had judgment.

The action was founded on a record from the State of Kentucky. The first plea was *nul tiel* record; the second was payment; the third was accord and satisfaction. On the trial, the defendants, by counsel, objected to the authentication of the record, the Court overruled the objection. The certificate of the Judge to the record was thus: "I certify that the certificate of the clerk is in due form of law." The act of Congress on the subject of authenticating records from one State to another, says, the Judge shall certify that the attestation is in due form. The objection here is, that the Judge in Kentucky has used the words "certificate of the Clerk," instead of the words "the attestation of the Clerk," and has superadded the words "of law." It is argued that attestation and certificate are not the same thing. It is insisted by Mr. Hunt, that attestation of a record means that the Clerk has affirmed that the record is true, and includes that the signature of the Clerk as well as the judicial seal of the Court, and that a certificate does not necessarily include the seal.

We are of opinion there is no force in this objection, as to the words "of law," being added to the Judge's certificate; we are of opinion that amounts to nothing (354) more than what is implied without those words being written or added, and cannot do any injury.

The record shows that after judgment was obtained in Kentucky, the plaintiff had an execution on the judgment. That a levy was made on property, and that the Sheriff returned the property to the defendant, on his giving a bond with security to pay the debt at the end of three months. It was insisted by counsel for defendants, that on the issue of *nul tiel* record, the plaintiff must show a good judgment, which must appear to be unsatisfied, or at least it must not appear to be satisfied. We are of opinion that if it appear from the record produced that there has been satisfaction thereof, that the record is not such a one as the plaintiff has declared upon.

Blair v. Caldwell.

The authority produced shows satisfactorily, that when there has been a levy on the defendant's property, or when a bond has been taken by the Sheriff, the judgment is satisfied, though the Sheriff should never sell the property; in such case the party must look to the Sheriff. See 12 *John.* 207; 1 *Sal.* 323; 2 *Tid.* 936; 2 *Ba.* 720. We are of opinion that the record ought to have been rejected; but inasmuch as the return of the Sheriff shows that a bond was taken, and no sale made, by the same law or pretended law of Kentucky, and now we cannot see what that law was; the cause will be remanded.

There was another objection taken by the defendant. In the record there was a copy of a bill in chancery. On the part of defendants against the plaintiffs, the defendants insisted that this bill being in the transcript, entitled them to read it. The Court refused the evidence, and rightly we conceive, because this bill was evidence made by the party who offered it. Some other objections were made on the part of the defendants, which we deem of no importance.

Another objection to the recovery is, that it appears by the record that the judgment was enjoined, and no disposition of the injunction appears. This is a good objection, until it appears the injunction was dissolved.

The judgment of the Circuit Court is reversed with costs, and the cause is remanded for further proceedings.

Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, OCTOBER TERM, 1833.

JOHNSON v. STRADER & THOMPSON.

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It cannot be assigned for error that the Court gave an improper verdict, the proper course is to move to set aside the verdict and except to the opinion in refusing it, as in case of the verdicts of juries.

ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court. [Not returned at last term.]

This was an action of assumpsit commenced in the St. Louis Circuit Court by the plaintiff in error against the defendants in error. The first count of the declaration alleges a special agreement between the plaintiff and the defendants for the transportation by the plaintiff for the defendants of 230,529 lbs. of lead from Galena to St. Louis, for the consideration of 37 1-2 cents per hundred pounds, to be paid on delivery. Plaintiff then avers the transportation and delivery according to contract, and the non-payment of freight. The second count is in indebitatus assumpsit, for freight and transportation of other lead. The defendants pleaded non-assumpsit, and set-off for lead, goods, wares and merchandize, sold and delivered by defendants to plaintiff. The second plea was traversed, and issue joined on both. At the March term of the Circuit Court, 1831, the cause was tried by a jury, and both issues found for the plaintiff, and damages assessed at the sum of \$309 64-100; the defendants afterwards moved for a new trial, which was granted, to which the plaintiff excepted and filed a bill of exceptions, setting out the evidence and reasons for the new trial. (356) By this bill of exceptions it appears that in the month of May, 1829, the defendants were the owners of 4,755 bars of lead, weighing 311,552 lbs., then lying at Galena, which they wished to have transported to St. Louis. About the same time the

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plaintiff, Johnson, employed one Thrasher to obtain freight for four flat boats, and to pilot them from Galena to St. Louis, which boats had been built by the plaintiff and his brother, Warren Johnson, Benjamin Hoffman and Malcolm H. Smith, in partnership. That Thrasher was employed by the plaintiff alone, who appeared to have the whole management; but who owned the boats after they were built witness did not know, but heard the plaintiff say that his brother, Warren, was a partner, but witness was employed by Whiting Johnson, and accounted to him. The boats are designated as Nos. 1, 2, 3 and 4. Thrasher contracted with Thompson, one of the defendants, to transport lead for defendants. Thrasher accordingly proceeded to load the four flat boats at his own discretion, putting such part of the lead as he thought proper into each boat, and after the boats were loaded, executed to the defendants in his own name four separate bills of lading in the usual form; by which it appears that there were shipped on board No. 1, 1,200 bars, weighing 78,600 lbs.; on No. 2, 1,237 bars, weighing 81,023 lbs.; on No. 3, 1,300 bars, weighing 85,150 lbs.; and on No. 4, 1,018 bars, weighing 66,779 lbs. Thrasher, in charge of the four boats, proceeded with them to St. Louis, navigating them together and shifting lading from one to the other as occasion required; that Thrasher first landed above St. Louis, and proceeded with two boats at a time. The two first were landed safely, but in attempting to land the other two, the boat No. 2 was sunk and 412 bars of lead wholly lost. All the lead, with the exception of these 412 bars, was delivered to the defendants, who paid over to Thrasher \$554 84-100, who executed a receipt therefor to the defendants, dated July 8th, 1829, by which he acknowledged to have received that sum in part of freight of four flat boats of lead from Galena to St. Louis; which sum, after deducting expenses, Thrasher paid over to Johnson, the plaintiff. Thrasher (357) informed defendant, Thompson, that he was acting for plaintiff, Johnson. At the trial the defendants moved several instructions, which were refused, and the Court gave other instructions, under which the jury having found for the plaintiff, the defendants moved for a new trial, which was granted, and the decision of the Court in giving the instructions was excepted to by the defendant, and the plaintiff excepted to the granting the new trial. Afterwards at the November term, 1831, the cause was again tried, neither party requiring a jury, the Court found the issues for the defendants and gave judgment accordingly, to reverse which this writ of error is prosecuted. At this trial a bill of exceptions was tendered by the plaintiff and signed by the Judge, which states that "on the trial of this cause the following evidence and admissions were read in evidence to the Court, sitting as a jury, to wit: (here the evidence and admissions being the same which were read on the former trial, and which is preserved in the bill of exceptions then taken, and which forms part of this bill of exceptions, are omitted). On this evidence and the admissions, the Court gave judgment for the defendants," &c. Upon this state of facts it is assigned for error,

First. That the Court granted a new trial.

Second. That it found the issues for the defendants against the evidence.

Third. That it gave judgment for the defendants.

The second and third errors assigned may be considered together, and will be first disposed of. It cannot be assigned for error that the Court gave an improper verdict. The proper course in such a case is to move for a new trial, setting aside the finding of the Court, in the same manner as in case of an improper finding by a jury. Upon the refusal of the Court to set aside its own finding, and award a new trial, a writ of

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error lies, and when the facts are all properly preserved, this Court can see if the Court below decided the law correctly or not. Having found the facts for the defendants, the judgment followed the verdict as a thing of course. The error first assigned presents a new question, and one of some difficulty.

(358) Having come to the conclusion, however, that the granting of a new trial by the Circuit Court can in no case be assigned for error, it is rendered unnecessary to look into the record of the first trial, or to discuss the several questions which have been presented upon that record. Mr. Bird, for the plaintiff in error, insists that there is no difference between granting a new trial and refusing a new trial by the Circuit Court; that the injury sustained by the suitor, and the error committed by the Court, where either act is done against the law and equity of the particular case, is precisely the same, or of the same character, and that the general powers of this Court (see *Rev. Code*, p. 635, sec. 50) extend equally to both cases.

We think differently, and are disposed to place this question upon the same footing with continuances improperly granted. Much injury may result, it is true, from both acts, whether they be properly or improperly done; but it cannot be seen and determined at the time, that in the end injury or injustice will be done; in either case the error committed in granting the new trial may be corrected on the second trial, or if persevered in, may be corrected on writ of error, the facts being properly preserved on the last trial. The Court not being unanimous on this point, it may be well in this particular case to state, that in looking into the record, a majority of the Court (differently constituted) think the Circuit Court erred not only in giving the instructions which were given, but also in refusing to give the sixth instruction asked for by the defendants; and therefore that the new trial was properly granted, so that on either point the judgment of the Circuit Court would be affirmed with costs.

M'GIRK, C. J., dissenting.

With regard to the sixth instruction given by the Court on the first trial, my opinion is that it was right, as were all the others given for the plaintiff, and that the new trial ought not to have been granted, whether the law makes it the duty of this Court to reverse the judgment rendered on the second trial where no exceptions were taken at that trial, but the exceptions relate to the former trial: I am not well satisfied either way.

Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, JUNE TERM, 1834.

JOHNSON v. STRADER & THOMPSON.

1. A refusal to set aside a non-suit, the improperly setting aside a judgment of non-suit, refusing improperly a continuance, and granting or refusing a new trial improperly, are all matters of error. (Note a.)
2. The law concerning ships and sea-going vessels is not applicable to flat boats and fresh water craft. The person making the contract for freight in flat boats, and not the owner of the boats, is entitled to it.
3. A joint ownership in boats cannot be inferred from the fact of a partnership in building them.
4. In an action by the bailee or carrier of goods to recover the freight or price of transportation, the defendant cannot recover by way of set-off as for goods sold and delivered, the value of the goods not delivered.
5. Trover will lie against a carrier for an actual conversion, but not for a mere neglect or omission to deliver.
6. For losses or injuries to property arising from the neglect of the bailee, a special action and not trover must be brought.
7. In an action of *indebitatus assumpsit* for goods sold and delivered, there must be proof of a sale expressed or implied.
8. When there is a special contract subsisting and in force, the plaintiff cannot waive it and recover in *indebitatus assumpsit*.
9. Where trover will lie, *assumpsit* will also, if the plaintiff chooses to waive the tort.

On re-argument.

WASH, J., delivered the opinion of the Court.

We have felt much difficulty in disposing of this cause, growing out of the state of the record and pleadings. When it was last argued, we inclined to think that a

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new trial improperly granted, could not be assigned for error, and that the plaintiff had lost his remedy by omitting to take the proper exceptions on the second trial in the Circuit Court. Further examination and more mature deliberation lead us now to a different conclusion. In exercising the superintending control and appellate (360) power given to this Court, we have uniformly encouraged the use of the writ of error, as the most convenient and least exceptionable mode. We have held that it is error to refuse, improperly, to grant a new trial; to set aside a non-suit; or to grant a continuance. It is not perceived that any good reason exists for a distinction between the case in which the Circuit Court refuses improperly to set aside a non-suit, and that in which a new trial is improperly granted. In neither case are the rights of the parties concluded, or an injury necessarily and irreparably sustained by the unsound exercise of the discretionary power of the Court. In both cases it is alike certain that the parties are improperly delayed and put to trouble and expense.

It seems to us, therefore, that the better doctrine is, that where the Circuit Court refuses improperly to set aside a non-suit, or where a judgment of non-suit well taken is improperly set aside, where a continuance has been improperly refused, or a new trial improperly refused or granted, the party injured may seek redress on writ of error in this Court: when the facts are properly preserved in such cases, this Court can see whether the Circuit Court has exercised its discretion soundly, and if we should think that has not been done we have then the means of redressing the wrong by reversing the judgment and placing the parties upon the ground they were compelled to abandon or were not permitted to occupy. This makes it necessary to look minutely into the record of the first trial which had been thought unnecessary on the first decision in this Court, in order to determine whether, upon the merits, the new trial was or was not improperly granted: the facts are sufficiently stated in the opinion delivered on the first argument of this cause. At the trial the defendants moved the following instructions:

First. If the jury find from the evidence that at the time the contract was made for freighting the four boats mentioned in the deposition of Stephen B. Thrasher, there were one or more persons in partnership in the ownership of the boats freighted, the plaintiff cannot recover in this action.

(361) Second. If the jury find from the evidence that the boats were built by the plaintiff and another person or persons, in co-partnership as joint owners, it must be presumed that such co-partnership and joint ownership continued to the time of making the contract for the freight of said boats, and the plaintiff cannot recover, unless it is proved to the satisfaction of the jury that such partnership was dissolved, and that said plaintiff at the time of making the contract for freight was sole owner of the three boats numbered one, three and four.

Third. If the jury find from the evidence that the plaintiff was not the sole owner of the four boats freighted, and that the contract for freight was entire for the whole four boats, the plaintiff cannot recover in this action.

Fourth. If the jury find from the evidence that the contract made by Thrasher with the defendants for freight, was entire for the whole freight, then the plaintiff cannot recover in this action, if it appears to the satisfaction of the jury, that any one or more of the boats belonged to any person other than the plaintiff.

Fifth. If the jury find from the evidence that any person other than the plaintiff was the owner of one or more of the boats, and that such owner and the plaintiff put their boats together for the purpose of being freighted and navigated together,

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and Thrasher was the agent of all the owners, authorized to engage freight for all the boats in one contract, that he did make a contract entire for the whole freight, and navigated and conducted said boats together in one adventure or voyage, the plaintiff cannot recover.

Sixth. If the jury find from the evidence that the contract for freight was made by Thrasher as agent for the plaintiff, and not of any other person ; and that such contract was entire for the freight of the whole four boats, then the jury ought to allow to the defendants a credit for the value of the lead not delivered, unless it appear to the satisfaction of the jury that the lead was lost by the unavoidable dangers of the river. Which instructions the Court refused to give, but instructed the jury as follows :

(362) First. The ownership of the boat or boats gives the right to recover the freight.

Second. That although the contract was made by Thrasher at the same time with defendants for freighting all of the four boats, yet the contract enures for the benefit of the owner or owners respectively, and each separate owner may recover against the defendants.

Third. That the question to Thrasher whether the boat was lost by the unavoidable accidents or dangers of the river was an improper one, and he was not competent to decide that point ; and that such question and answer ought not to go to the jury.

Fourth. That if the jury find from the evidence, a partnership between plaintiff and one or more persons as to the ownership of the boats in the declaration mentioned, they ought to find for the defendants.

The defendants excepted to the opinion of the Court in refusing to give the instructions prayed for, and also in giving the instructions which were given. The plaintiff then prayed the Court to give the jury the following instructions :

First. That if the jury should find that Whiting Johnson was the only person known to the defendants at the time of making the contract for freight, but that Smith was the owner of one of the boats, Smith can sue for the freight which his boat carried, and Johnson for the residue of the freight.

Second. That no damage which the defendants may have sustained by the sinking of flat boat number 2 can be off-set in this action.

Third. That the plaintiff is entitled in this action to recover the amount of freight agreed upon for so much lead as he delivered at St. Louis, deducting what has been paid to him. Which instructions were accordingly given and excepted to by the defendants.

The jury found a verdict for the plaintiff, which, upon motion of the defendants' counsel, was set aside and a new trial awarded, to which the plaintiff excepted ; and it is now to be seen whether or not the new trial ought to have been granted on the (363) ground that the Circuit Court erred in giving or refusing to give instructions.

The defendants' first instruction was properly refused, the law applicable to ships and sea-going vessels, is no way applicable to flat boats and fresh water craft. Ships and vessels are registered in their owners' names, and are known to be navigated for the benefit of the owners, by persons employed for that purpose, who have rarely any interest at stake beyond their stated wages, &c. It is just and reasonable, therefore, that the owner of the ship should be entitled to the freight ; but who can know the owner of a flat boat ? Usually the owner is navigator and carrier, and in that way becomes entitled to claim the freight, under his contract to transport or carry,

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and not because he is owner. This instruction was properly refused for another reason also. The evidence of partnership related to the building and not to the ownership of the boats.

The builder in truth is rarely the owner, and no inference of joint ownership in the boats could be drawn from the fact that they were partners in the contract for building. Besides, if in general such an inference might arise, it is in this case completely rebutted by the proof that one of the joint builders descended with the boats from Galena to St. Louis without once claiming or attempting to assert or make known in any way his right of ownership.

The defendant's second instruction was rightly refused upon the same grounds that justified the Court in refusing the first.

The defendant's third instruction is bottomed upon the same mistaken notion that ownership in the boat or wagon gives the owner, instead of the person who contracts to carry, the right to claim the freight.

The defendant's fourth instruction is like his third. The entire contract with Thrasher as the agent of Johnson for the whole freight of the four boats, gave Johnson who had possession and control of the boats as owner thereof, full right to sue for and recover the freight in his own name, whether the boats did in fact belong to him or not. It was therefore properly refused.

(364) The defendant's fifth instruction was also rightly refused. There was no evidence that the boats were owned jointly, or that the joint owners or builders put their boats together for the purpose of being freighted and navigated together. Or that Thrasher was the agent of any person other than Johnson, or knew any one else as owner.

The defendant's sixth instruction raises a question on which we now feel no difficulty, and which shall be considered after we dispose of the other instructions that were given. And first of those given by the Court in lieu of those asked by the defendants.

The first, second and fourth instructions given by the Court were erroneous for the reasons assigned in noticing the first instruction refused, and for the same reasons which made it proper for the Court to refuse to give the defendants' five first instructions. The giving of these instructions was inconsistent with the rejection of those asked for by the defendants. Being prejudicial to the plaintiff however, and in accordance with the previous prayer of the defendants, it does not lie in their mouth to object that they are inconsistent and contradictory. Such they clearly are, but they did no injury to the defendants.

The third instruction given by the Court has no bearing on the question now raised. Now as to the instructions asked by the plaintiff.

The first instruction given on the prayer of the plaintiff was wrong in law, inconsistent with the refusal of the Court to give the five first instructions asked for by the defendants, and irrelevant to the matters in proof as well as to the parties in the cause. However, as far as it could have any operation, it was against the interest of the plaintiff, and cannot, therefore, avail the defendants.

The second instruction asked for by the plaintiff and given by the Court, is in substance the converse of the sixth instruction asked for by the defendants and presents precisely the same question, which we will presently consider.

The third instruction asked by the plaintiff was inconsistent with the previous instructions given. If (upon the principle laid down by the Court) the ownership of

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(365) the boat gave the right to recover freight, then this third instruction would be clearly wrong, since it took the question of ownership entirely from the jury who were the proper judges of that fact. But in the view we take of the subject, this instruction was well enough, since the proof of partnership which was made could in no way affect the plaintiff's right to sue for and recover the whole freight of the four boats. The only question now left to be disposed of, arises on the plaintiff's second instruction which was given, and the defendants' sixth instruction which was refused ; and it is this :

In an action by the bailee or carrier of goods to recover the freight or price of transportation, can the defendant recover by way of set-off as for goods sold and delivered, the value of the goods not delivered ? The affirmative is earnestly maintained by the defendants' counsel. He argues thus, that trover would lie in such case for the goods not delivered : and that wherever trover will lie, the owner may waive the tort and bring assumpsit ; and that wherever indebitatus assumpsit will lie for goods sold and delivered, a set off may be pleaded, &c. The conclusion is clearly and logically drawn and comes to sound law, but the postulate is false. It is not true that trover would lie in such a case.

Trover will doubtless lie against a carrier for conversion, but then it must be an actual conversion by some illegal assumption of ownership by illegally using or injuring the property. Something more than a mere neglect or omission to deliver. *S. Burr.* 2825, *Ross v. Johnson*; 2 *Salk.* 655; *Peake's N. P. C.* 49; 2 *Saund.* 47; *c. n. I Bull. N. P.* 44; 6 *East.* 540; *Peake's Evi.* 298; 1 *Chit. pl.* 154. The refusal to deliver may be on the ground that the property was left in pledge, or that as carrier he detains until the carriage is paid for, and so the refusal being justified would not amount to a conversion. The detention must be *wrongful*, and how can it be said that the party detains wrongfully, when in truth the property has been lost or destroyed by accident ?

For losses or injuries to property arising from neglect, the owner will not be put (366) to his special action, and cannot bring trover.

So in indebitatus assumpsit for goods sold and delivered, there must be proof of a sale express or implied : a naked delivery will not do. It may have been the defendant's own property returned to him ; or it may have been delivered in payment of a previous debt or as a pledge ; or it may have been delivered to a carrier who could well account for it in an action on his special contract ; where there is a special contract subsisting and in force, the plaintiff cannot waive it and recover in indebitatus assumpsit. Much reliance has been placed in argument on the case of *Floyd v. Wiley*, decided by this Court, 1 *Mo. Decisions* 430 and 643. That case will not sustain the positions taken by the counsel for the defendants. In that case the property had been wrongfully detained, under a claim by sale and purchase from a person having no title ; and the plaintiff was allowed to waive the tort and recover in assumpsit, that is, upon the general principle, that where trover would lie, assumpsit will also, if the plaintiff may choose to waive the tort. The authorities cited in that case fully sustain the principle of the decision. We are of opinion, therefore, that the Circuit Court decided correctly in refusing to give the defendants' sixth and in giving the plaintiff's second instruction. And the mis-direction of that Court in the other matters objected being to the prejudice of the plaintiff, afforded no ground for the new trial granted to the defendants. Upon the whole matter then, the judgment of the Circuit Court is reversed, and the cause remanded with directions to that Court to

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enter up a judgment for the plaintiff on the verdict of the jury as it was found on the first trial.

(a.) See *Martin v. Hays*, 5 Mo. R., p. 63; *Howell v. Pitman*, 5 Mo. R., p. 247.

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BATES v. MARTIN.

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1. A payment made to the payee of a note by the maker, after the assignment of the same, and before the maker had any notice of such assignment, is not a good defence to an action by an assignee of the note; and it is immaterial whether the note be due and payable or not, when it is assigned.
2. It is the duty of the maker to look after his note, and to know whether it has been assigned, before he pays it.

ERROR to the Circuit Court of St. Louis county.

TOMPKINS, J., delivered the opinion of the Court.

Martin sued Bates in the Circuit Court of St. Louis county on a note dated the 6th April, 1832, and payable four months after date. The plaintiff below was assignee of the note. The assignment was dated 12th April, 1832. The defendant pleaded,

First. General issue.

Second. That he had paid the note to the assignor before the commencement of this suit, and before the note was due and payable, to-wit: on the 9th day of May, 1832.

Third. That before the commencement of the suit, and before he had any notice of the assignment of the note sued on, and before the same became due and payable, he had paid to the payee and assignor of the note, the sum of money in the note specified. Issue was taken on the first plea, and demurrers filed to the second and third. The demurrers were both sustained, and the issue found for the plaintiff and judgment entered up. On the trial of the cause, the note and assignment endorsed thereon were read in evidence by the plaintiff, and the defendant read in evidence a receipt of the assignor of the note, showing the payment of the amount of the note to him on the 9th day of May, 1832, nearly three months before it became due. No other evidence was offered on either side. A verdict was found for the plaintiff; and the defendant moved the Court to set it aside as against law and evidence. The motion being overruled, the defendant excepted to the opinion of the Court, and the cause comes here for reversal. The questions to be decided are, were the demurrers properly sustained? and was the motion for a new trial properly overruled?

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(368) The two questions each bring up the same point of law to be decided, viz: whether a payment made to the payee by the maker after the assignment of the same, and before the maker had any notice of such assignment, is a good defence to the assignee's action. By our statute, bonds, bills, notes, &c., are made assignable, and the assignee may sue on them in his own name, in the same manner as the original holder could do; and it shall not be in the power of the assignor, after assignment made as aforesaid, to release any part of the debt or sums really due on such bonds, bills or notes; provided nothing in this section shall be so construed as to change the nature of the defence in law, that any defendant may have against the assignee or original assignor; but the said defendant may make the same defence against any such bond, bill or note, in the hands of the assignee, that he could have done, if the said bond, bill or note had remained in the hands of the person who was the holder thereof when the defence accrued, and was sued on his name. This note was assigned on the 9th day of April, 1832, and from that time the statute deprived the payee or assignor of the power to release any part of the debt or sum really due: on the 9th day of May, one month after the assignment, Bates pays the sum due on the note to the assignor, while it was in the hands of the assignee.

His defence then accrued while Martin held the note, and it was against the assignor. Before he paid, he should have seen that the payee still retained it, and had not assigned it; it is quite immaterial whether the note be due and payable or not, when it is assigned. In each case it is equally the duty of the maker to look after his note, and to know that he pays his money to whom it is due. It is the opinion of this Court, then, that the Circuit Court did not err either in sustaining the demurrers or in its finding of the issue for the plaintiff. Its judgment is therefore affirmed.

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BARNETT & IVERS v. LYNCH.

1. A defendant suffering judgment to go by default against him in the Justice's Court, is not entitled to an appeal without first moving to set aside the judgment by default. The 2d section of the act of 1826, regulating proceedings in Justices' Courts, and which allows appeals "in all cases," does not repeal the proviso to the 22d section of the act of the revised code, entitled "An Act establishing Justices' Courts," &c.
2. Quere? Whether a summons requiring a defendant to answer Thomas Barnett & —— Ivers is not good?
3. Appearance in a cause waives defects in the summons.

ON ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

The plaintiffs in error brought suit against the defendant in error, before a Justice of the Peace, and had judgment by default, from which the defendant appealed to the Circuit Court, where the judgment by default was set aside or reversed, and the plaintiffs in error now prosecute their writ of error in this Court to reverse the judgment of that Court. The original summons served on the defendant required him to appear and answer Thomas Barnett & —— Ivers, &c.; the defendant appeared, and after several continuances, not appearing on the day set for trial, a judgment by default was rendered against him, which upon motion and cause shown by the defendant was on the next day set aside; the cause was afterwards submitted to a jury, who, not being able to agree on a verdict, were discharged by the consent of parties; afterwards, on the day appointed for trial, the defendant again made default, when a jury was called to assess damages, and rendered a verdict, on which judgment was entered up against Lynch. Ten days thereafter, the defendant (without having made any motion to have the judgment by default set aside, and a new trial granted) prayed an appeal, which was allowed. On the trial in the Circuit Court, the judgment of the Justice was reversed on the ground that the christian name of Ivers, one of the plaintiffs, was omitted, and the cause has been brought here to reverse the judgment of the Circuit Court. The points relied on are,

(370) First. That the Circuit Court had no jurisdiction of the cause, the appeal having been improperly allowed by the Justice.

Second. That the defect in the summons in omitting the christian name of Ivers, was cured by the appearance of the defendant, and the proceedings before the Justice; and the judgment of the Justice improperly reversed for that defect.

As to the first point it is provided, *Rev. Code*, p. 481, sec. 22, "that no appeal shall be allowed in any case where the judgment shall have been rendered by default, or for non-suit, unless the Justice of the Peace shall first have refused to grant to the party aggrieved, a new trial; if the same be applied for within twenty days from the rendition of the judgment." The counsel for the defendant in error contends that this provision of the *Rev. Code* is repealed by the act of the General Assembly passed on

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the 23d Dec., 1826, entitled "An act supplementary to an act entitled an act establishing Justices' Courts and regulating the collection of small debts," (sess. acts, p. 33,) the 2d section of which provides that in all cases within the jurisdiction of a Justice of the Peace, any person or persons who may think himself or themselves aggrieved by the judgment of said Justice, may by himself or agent have liberty to appeal therefrom within ten days thereafter, and the bond or recognizance required by law to be entered into, shall be given on the day the appeal is granted. The 22d sec. of the *Rev. Code* containing the proviso above recited, is in nearly the same words. The only difference is, that the act of 1825 allowed twenty days for taking the appeal, and fixed no time for entering into the recognizance; the time is shortened by the act of 1826, to ten days, within which the appeal may be taken, and requires the recognizance to be given on the day the appeal is granted; the objects of the second act are obvious enough, the provisions are no way inconsistent, and it seems to us clear that the proviso to the 22d sec. in the *Rev. Code* is not repealed or affected by the act of 1826; the first point is therefore ruled for the appellants, and (371) this would render it unnecessary to decide the second point. But as the law is very clearly with the appellants on this point also, it seems best not to pass it by.

This objection to the summons, if indeed it could have been raised at any time (which may be doubted, 7 Peters, 431,) was certainly waived by the repeated appearance of the defendant and the proceedings before the Justice. The judgment of the Circuit Court is therefore reversed, and the cause remanded.

BALDRIDGE v. BRYAN.

In an action for goods sold and delivered, the testimony showed goods sold to the amount of \$130 only, and the receipt of considerable sums of money by the defendant from the plaintiff; the verdict was for \$230; held that a new trial should have been granted, as there was no count in the declaration to which the evidence for money received was applicable.

APPEAL from the Circuit Court of Crawford county.

MCGIRK, C. J., delivered the opinion of the Court.

This was an action of assumpsit for goods sold and delivered, brought by Bryan against Baldridge. On the general issue the parties went to trial; verdict and judgment for the plaintiff for \$230. The appellant made two points in the case; the first is, that the verdict does not find the issue. The verdict is, that the jury find the

Barry v. Johnson.

plaintiff has sustained damage, as alledged in his declaration, to the amount of \$230. We will pass this point for the present, inasmuch as we are of opinion that the Court erred in refusing a new trial.

The testimony on the part of Bryan shows goods sold to Baldridge to about the amount of one hundred and thirty dollars, it also shows that Baldridge received money of Bryan to a considerable amount; but the witness does not know how much, but there is no count in the declaration on which this evidence could be applied. The jury must however have founded their verdict to the amount of \$100 on (372) this sort of testimony, a new trial ought to have been granted. The judgment is reversed, the cause is remanded to the Circuit Court for a new trial.

BARRY v. JOHNSON AND JOHNSON.

3	375
146	150
3	378
163	535

In an affidavit to set aside a judgment by default, the defendant should state that he has, or that he believes he has, merits; and should moreover set forth what evidence he expects to produce to sustain his case.

APPEAL from the Circuit Court of St. Louis county.

TOMPKINS, J., delivered the opinion of the Court.

The appellees brought their action against Barry, to recover the possession of some slaves charged to be in his possession.

The defendant failing to plead within the time required by the statute, the plaintiffs took judgment by default; afterwards the defendant moved the Circuit Court to set aside the judgment by default, for reasons assigned in an affidavit filed by him; the Court overruled the motion, and he appeals to this Court.

The defendant, in his affidavit filed on his motion for a setting aside the judgment by default, states that he came into possession of the slaves sued for as administrator of John Hartnett, deceased, and now holds them as administrator of such deceased; the defendant knows that Hartnett held such slaves for about three years before his death, and said defendant had held the same about six or seven years since the death of said Hartnett, and caused an inventory to be made of them and filed as of the property of the deceased; the affiant thought it his duty to defend the suit, and intended to do so, and for such purpose, soon after the commencement of the suit, he employed counsel to defend it, and that his counsel had informed him he had forgot his engagement, and therefore he had failed to put in a plea.

(373) The defendant does not state in his affidavit, either that he has merits or that he believes that he has; on the contrary he states facts which may well be true,

Coonce v. Munday.

and yet he may have no merits. The second count of the declaration makes the statement of such a case as the affidavit does, showing that the slaves sued for had been delivered over to Hartnett to be by him retained till some time about the year 1832, and then to be delivered to the plaintiffs. In such a case as this is, the Court will expect the defendant on motion to set aside a judgment by default, to state in his affidavit that he believes he has merits, and what proof he expects to produce to sustain his case. The Circuit Court, it is thought, has committed no error in refusing to set aside the judgment by default. Its judgment is therefore affirmed.

3	373
155	500

COONCE v. MUNDAY.

1. The Clerk of the Circuit Court has authority to issue an execution on a transcript of a judgment of a Justice of the Peace, filed in his office.
2. What is clearly implied by a statute, is as much a part of the statute as if expressed in words.
3. A recital in an execution issued by a Clerk of a Circuit Court, on a transcript of a judgment of a Justice, that execution had been issued by the Justice, and returned by the Constable not satisfied for the want of property, is not evidence of these facts.
4. In an action of ejectment, brought to recover land sold under an execution issued by a Clerk of a Circuit Court on a transcript of a judgment of a Justice, it is essential, to make title in the plaintiff, that he prove that execution had been issued by the Justice, and the proper return made thereon by the Constable, before the execution was issued by the Clerk of the Circuit Court; the record of the Justice is evidence of these facts. (Note a.)

ERROR from St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

Felix Coonce brought an action of ejectment against Munday for a lot of ground in the city of St. Louis. There was a verdict and judgment for the defendant. It appears by the record that Alexander Scott and William K. Rule obtained a judgment before a Justice of the Peace against James Malloy, for the sum of ninety dollars and costs; which judgment was obtained on the 26th day of October, 1829, and that the plaintiff filed a transcript of the judgment and proceedings before the Justice of the Peace, in the Clerk's office of the Circuit Court of the county of St. Louis. That the Clerk issued an execution thereon, which execution was levied on the lot in question, which was sold as the property of Malloy. Scott and Rule be-

Coonce v. Munday.

came the purchasers, that they afterwards by deed sold the same property to Coone, the present plaintiff. It does not appear by the transcript filed, that any execution had been issued by the Justice before the execution had issued from the Clerk as aforesaid. That in the execution issued by the Clerk, he recites the fact that the transcript had been filed in his office, and that an execution had been issued by the Justice of the Peace, and that no goods or chattels had been found by the Constable, and no satisfaction was had on the judgment of said Justice. The Clerk's execution therefore commands the Sheriff to levy upon the lands and tenements of said Malloy. It appears also that Munday, the defendant, claims under Malloy. From this state of facts, the defendant's counsel prayed the Court to instruct the jury, that the plaintiff could not recover; which instruction was given, whereupon the defendant had judgment. The point raised in the instruction is this: whether the plaintiff must not prove upon the trial that an execution had issued by the Justice of the Peace upon the judgment by him rendered, before he was entitled to have execution on the same from the office of the Circuit Court. The plaintiff insists that if necessary, it sufficiently appears by the recital of it in the Clerk's execution. He insists again that it need no where appear in evidence, and if the fact was so, that no person can take advantage of it but the defendant in execution; and that he can only do it by motion in the Circuit Court to set aside the execution issued by the Clerk. By the 30th section of the act respecting the Justices' Courts, it is enacted that any person obtaining a judgment before a Justice of the Peace, for any sum above ten dollars, may file a transcript of such judgment in the office of the Clerk of the Circuit Court of the county where the judgment was rendered, which shall from the time of filing of such transcript have the same lien on the real estate of the defendant as judgment rendered in the Circuit Court. Provided no execution shall issue out of the Clerk's office until an execution shall have issued by said Justice, and the Constable or other person to whom the same may be directed as aforesaid, shall have returned that no goods or chattels of the defendant are to be found in his township. *Revised Code*, 484.

It is first objected by Mr. Spalding for the defendant, that the 30th section above recited gives no authority to the Clerk to issue an execution at all. Upon this point the Court are of opinion that the execution may well issue. It is true that the section aforesaid does not say that an execution shall issue, but it says that the Justice's judgment, when filed, shall be a lien; for what purpose would it be a lien unless there were some means to enforce it. The section says, "that no execution shall issue from the Clerk's office until one has been issued by the Justice of the Peace," &c. It is clear that the Legislature were of opinion that they had given the power to the Clerk to issue an execution, otherwise for what purpose would they have used this mode of expression; can any one fairly doubt that the Legislature intended any thing else but that an execution should issue?

It is a rule that that which is clearly implied by a statute, is as much a part of the statute as if the same were expressed in words.

Mr. Bates for the plaintiff contends that the Clerk is entirely competent to certify in the execution, that an execution had been issued by the Justice, if it appears of record to be so.

We are of opinion that he is not entrusted by the law to certify any such fact, nor are we sure that he is bound to inquire into the fact when he is called on to issue an execution; but perhaps the better practice is for him to satisfy himself that an ex-

Fulkerson v. Steen.

(376) cution had issued, as required by the statute, before he acts. The law expressly forbids an execution to issue until one has issued from the Justice.

We consider the existence of this fact to be essential; the law makers had an undoubted right to prescribe the terms on which the execution might or should issue, and when they have done so, no one can dispense with those terms. With regard to property attached, the law requires that before the property is sold, the plaintiff must give bond and security. Can any one pretend that any sale of the property would be of any value in law, unless the bond were given? If the existence of the fact is essential, the next inquiry is, how shall it be made to appear? We think it must be proved by the party who seeks and claims an interest under it; the mode of proof is easy and plain, the record of the Justice would prove it. But the plaintiff's counsel argues, that at best the want of the execution is only an irregularity which cannot be taken advantage of by any one but the defendant in the original action, and he cites a case from *Johnson's Reports*, where an execution issued on a judgment after a year had expired without a *scire facias* to revive: in that case the Court held that the want of a revival was a mere irregularity, and refused to permit a party who was no party to the original suit, to take any advantage of the irregularity. The law is clearly so; it allows in that case the execution to issue, subject to be quashed, but says the execution is good till quashed: in the case before us, the law says the execution can have no existence. We are therefore of opinion that the Court did not err in requiring proof on the trial, that the execution had been issued by the Justice, &c. The judgment is affirmed.

(a.) See *Burk v. Flournoy et al.*, 4 Mo. R., p. 117.
Jones v. Luck, 7 " " 554.

(377) FULKERSON, ADMINISTRATOR OF CLAY, v. STEEN.

1. In an action on a penal bond conditioned to be void on payment of a less sum at a day certain, the plaintiff must, in his declaration, set out the condition and assign breaches.
2. A penal bond conditioned to be void on payment of a less sum at a day certain, and the performance of other things, is not within the 1st section of the act concerning penal bonds, and in an action thereon, the plaintiff is not bound to set out breaches in his declaration, but may if he chooses.

APPEAL from St. Charles Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

Fulkerson, administrator of Clay, brought an action of debt against Steen on a bond subject to a condition, without setting out any part of the condition, for the

Fulkerson v. Steen.

failure to do so, the defendant demurred; the Court sustained the demurrer and gave judgment for defendant. The bond declared on is for four hundred and twenty-four dollars; the condition of the bond is, that whereas Steen has heretofore hired of Fulkerson three negroes, at the rate of two hundred and twelve dollars for one year, and the said Steen binds himself to pay said sum, and to find said negroes in sufficient clothing, bedding, to treat them properly, to pay the taxes, and at the end of the year to return them to Fulkerson, administrator of Clay. Now if said Steen shall well and truly pay and perform the things above mentioned, then the above obligation to be void, &c.

The question raised in this case is whether the plaintiff was bound in his declaration to set out the condition of this bond and assign breaches thereon. There can be no doubt that at common law he was not bound to do so. Whether he was bound to do so by the statute, we will now examine. By the first section of an act of the General Assembly, passed 27th June, 1821, *Rev. Code*, 615, it is enacted that in all actions brought upon bonds or bills in which there is a condition to be void on the payment of a lesser sum at a day certain, if the defendant shall bring into Court all the principal, interest and costs of such action, the money so brought in shall be deemed a discharge, and the Court shall give judgment accordingly. The section (378) then proceeds to say, that "in all actions brought on such bonds, the plaintiff shall set out the condition in his declaration and may assign as many breaches thereon as he shall think proper, and if judgment be rendered thereon, the judgment shall be for the sum really due, &c."

It is insisted by Mr. Geyer for the appellant, that the bond declared on is not within this section, because this condition is for the payment of a lesser sum and for the performance of several other things. We have no hesitation in deciding this position to be correct; the condition is so, and therefore not within the first section of the act. We will now examine if the bond comes within the second section of the act: the language of this section is, "that all actions upon any deeds or bonds for any penal sum for non-performance of any conditions, covenants or agreements in any indenture, deed or writing contained, the plaintiff may assign as many breaches as he may think fit, and the jury upon the trial of such breaches may assess damages," &c. We are of opinion that although the bond sued on is embraced by this section, yet the plaintiff is not in this case, as in cases arising under the first section, bound to set out his breaches in the declaration; the first section says he shall do so, this section says he may; the first section is for the benefit of defendants in cases to which it extends, the latter is for the benefit of plaintiffs as to the cases to which it extends, and the plaintiff may, if he chooses, assign breaches. The judgment of the Circuit Court is reversed; the cause is remanded for further proceedings.

(379)

EASTON & RUSSELL v. COLLIER.

1. A former recovery pleaded in bar to a bill for relief against a judgment at law, alledged to have been obtained by fraud, will not avail the defendant.
2. Where a defendant files his pleas and puts in his answer to a bill at the same time, and the pleas are overruled, it is error to take the bill for confessed; the course should be to take the bill for confessed as to so much as was unanswered, and to set the cause for hearing on so much of the bill as was answered and the answer.

APPEAL in Chancery from the Circuit Court of St. Louis county.

TOMPKINS, J., delivered the opinion of the Court.

Collier states in his bill that sometime in August, 1820, Easton obtained a judgment in his own name in the Circuit Court of Lincoln county, against one Prospect K. Robbins, in an action of debt on a note of said Robbins to said Easton, which note was for \$1731 86, that sum being the amount of the debt, and the damages amounted to \$58 44 as nearly as the complainant can recollect; that the process in this suit was a writ of capias, and that Ira and Almond Cottle became the bail of Robbins; that on or about the 8th August, 1820, said bail came into the Circuit Court of Lincoln county, and surrendered Robbins in discharge of themselves; that on the same day the complainant and one Joshua N. Robbins appeared in Court and acknowledged themselves bail for said Prospect K. Robbins; that the complainant being made liable as bail, Easton instituted suit against him and recovered judgment and made the money by execution. The complainant further states that on 10th April, 1820 said Easton commenced another suit against said Prospect K. Robbins on another note for the same amount as the former; that the form of the last was like the former, debt, and the process also a writ of capias; that afterwards on 7th August, Robbins, the defendant, the process in the cause not being served, came into the said Circuit Court of Lincoln county and consented that judgment should be entered up against him for the debt and damages, the last amounting to forty-one dollars and twelve cents; that Easton failing to make the money on judgment against Robbins, commenced another suit on the same recognizance against the complainant and Joshua N. Robbins in the Circuit Court of St. Charles county, pretending that it was a recognizance entered into by the complainant and said Joshua N. Robbins, as bail in the second suit above mentioned; and the complainant then avers, that he did not become bail for said Prospect K. Robbins in the second suit instituted against him by Easton; the complainant further states that he pleaded to said suit, that there was no record of such recognizance, and that issue was taken on that plea; that on the trial of this issue, Easton produced in evidence a transcript of the record of a judgment rendered in Lincoln county against said Prospect K. Robbins on the note secondly above mentioned, in which transcript was embodied the transcript of the recognizance entered into by the complainant in the first action against Robbins.

Easton v. Collier.

above mentioned; that on this evidence the Circuit Court of St. Louis county, to which the cause had been removed, entered up judgment against him for the sum of \$2540 55, debt and damages, as well as the costs, and that the money had been paid by him to the Sheriff on execution, who has paid the same over to William Russell, assignee of said Easton. The complainant then charges that either the Clerk of the Circuit Court of Lincoln county must, by mistake or fraud, have copied the said recognizance into this transcript: or that Easton having obtained several transcripts of the record in both cases against said Robbins, or parts thereof, has put them together and in that manner made up the transcript of the record so shown in evidence as aforesaid. He then charges that Easton had knowledge of the mistake or fraud of the Clerk in making out the record; and that Russell received the money as trustee of Easton, and concludes by praying that Easton and Russell may answer; and for relief. To this bill Easton files three pleas.

First. That he had before sued the complainant at law on the said recognizance and had judgment against him in said suit.

(381) Second. That he sued complainant on said recognizance and that the complainant pleaded *nul lieu* record, on which an issue being made up, a trial was had, and the Court found there was such record; and concludes by averring that he did not by procuring several records and putting together parts thereof, make up the record given in evidence as in the bill stated, and that he had no knowledge of any fraud, mistake or misconduct of the Clerk of the Circuit Court of Lincoln county in making out the transcript as alledged in the bill of complaint.

Third. That there is such a record of recognizance in Lincoln Circuit Court as is averred in the declaration.

When this cause came before this Court on another occasion, it was on demurrer to the bill for relief, and the Court then decided that the former recovery pleaded in bar in the first and second pleas could not avail Easton. See the opinion delivered at April term, 1829. Russell pleads the same as Easton, and denies all fraud or collusion. As to so much of the second plea as denies that he did make the record sued on, by putting together several parts of the record of the two causes as suggested in the bill; this is precisely what the defendant, by the former decision of this Court, was required to swear to. By the same decision he was required to state on oath what is contained in the third plea. These three pleas are then bad in the opinion of this Court. The Circuit Court then, we think, committed no error in overruling these pleas.

But that Court ordered that the bill be answered, or the same should be taken as confessed against them. The defendants had, at the time they filed their pleas, filed answers to the bill. The 12th section of the act to regulate proceedings in Chancery requires that when the defendants' pleas shall be overruled or found against him, he shall answer the bill immediately, or in default thereof, such part as shall be unanswered shall be taken as confessed. The 20th section requires, that where no replication is filed as in this case, the cause shall be set for hearing on bill and answer. It is the opinion of this Court that the Circuit Court erred in taking the bill for confessed and entering up judgment. The course should have been to take the bill for confessed, as to so much as was unanswered, and to set the cause for hearing on so much of the bill as had been answered, and on the answer. The decree of the Circuit Court is therefore reversed, and the cause remanded for proceedings in conformity with this opinion.

3	382
107	670

HIMES v. MCKINNEY.

1. An instruction grounded on a partial statement of the facts of a case, is properly refused.
2. If a defendant in trover come lawfully in possession of goods, and afterwards converts them to his own use, no demand is necessary.
3. By means not appearing, an individual becomes the holder of a note payable in plank; an agent of the holder receives the plank in payment of the note from the maker, and while in the agent's possession the plank is taken by another: in an action of trover by the holder, to recover the value of the plank, the Court correctly instructed the jury that they had nothing to do with the question, whether the legal title of the note was in the plaintiff? and if the maker of the note in good faith paid the plank to the holder and received his note, the right to the plank was vested in the holder.
4. The holder of a note is *prima facie* the owner of it.

ERROR to Crawford Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

An action of trover was brought by Alexander McKinney against Himes, for taking and converting to his use fifteen thousand feet of pine plank. The defendant pleaded not guilty, verdict and judgment were given for the plaintiff for \$160 25. It appears by the record that one Blankenship made his note to one Reed, to pay to him 15,000 feet of pine plank, that the note afterwards without it being shown how, came into the hands of McKinney, that McKinney put the note into the hands of one Lynch for collection, and made Lynch his agent for that purpose, that Lynch received from Blankenship about 5,000 feet of plank on the note, that then Lynch put the note into the hands of one McCutchen, to receive for McKinney the balance, and (383) McCutchen did agree with him to receive the balance and convey the same down the Gasconade river and to deliver the whole to the plaintiff, that McCutchen did receive the balance of the 15,000 from Blankenship, and then received of Lynch what he had before received and took charge of the whole. While McCutchen was thus in possession, Himes the plaintiff in error, sued out an attachment against Reed as an absconding debtor, and caused the same to be levied on the plank as Reed's in the hands of McCutchen: that afterwards Himes took possession of the plank, informing the Constable that the debt in the attachment was settled, and directed the Constable to relinquish his possession as an officer, which he did: that Himes then sold the plank to McCutchen and one Samuel Ward, who carried the same down the Gasconade river, sold the same on their own account and used the money; it was also proved, that during the time the note was in McCutchen's hands, there was an assignment on the same from Reed to McCutchen, that when the note was paid it was delivered to Blankenship, who tore his name off and that the note was destroyed. That McKinney delivered the note to Lynch as his property.

On this state of facts the defendant moved the Court to instruct the jury, if they believe from the evidence the defendant ordered the Constable to levy on the plank

Himes v. McKinney.

in the custody of the plaintiff's agent, and without having injured or removed the same from the place where it was when levied on, and that the same was returned by the defendant to the plaintiff's agent, then they can only find for the detention and not for the value. The Court refused this instruction and rightly too, because this instruction as asked, does not go to the whole case; there was farther testimony showing the defendant's acts did not stop here; he sold the plank as his own after the attachment was raised.

The defendant then asked the Court to instruct the jury, that if they believe the defendant came into possession of the plank by legal means, then the jury must find for the defendant, unless they also find the plaintiff, before he brought his suit, made a demand of the plank of the defendant, which instruction the Court refused. This (384) instruction was correctly refused, because the law is, that although the defendant in trover became legally possessed of the goods, yet if he actually convert them to his use, then no demand is necessary. The Court then instructed the jury that the defendant had given no evidence to show that the property in the plank was in any other person than himself. This instruction though unnecessary and uncalled for, was in point of fact true. Possession by the plaintiff or his agent was sufficient to entitle him to recover. This rule as applied to this case was correct. The third instruction given was, that if the defendant converted the plank to his use, by selling and permitting it to be removed and the plaintiff was in possession of his own property, the jury should find for the plaintiff. This instruction was correct.

Fourth. That they have nothing to do with the title of the note, whether the legal title was in the plaintiff or not.

And fifth. That if the debtor chose to deliver the plank to the plaintiff in good faith and receive his note, the right of the plank vested in McKinney. These instructions were unquestionably correct as applied to this case, because the plaintiff was *prima facie* the owner of the note.

McCutchen never claimed it, undertook to be the agent to receive the plank for the plaintiff and did do so. Himes as far as we can see, had no earthly title, yet he sold the plank.

We cannot see any reason to reverse the judgment. It is therefore affirmed, with costs.

(385)

GORDON v. DUNCAN.

A negro on recovering his freedom, is entitled from his claimant to the value of his services, or the wages he may have earned during the pendency of his suit, though the claimant may have held him during that time by virtue of an order of the Court; and trespass and false imprisonment is the proper form of action to recover the value of his services, or the wages earned.

APPEAL from Circuit Court of St. Louis county.

MCGIRK, C. J., delivered the opinion of the Court.

The plaintiff Gordon brought an action of assault and battery against the defendant, in which judgment was rendered for the defendant. In this case there was a special verdict, which verdict finds, that in May, 1830, the plaintiff brought his action under the statute for freedom against Coleman Duncan, that the Court made an order and under that order the plaintiff was hired out during the pendency of the suit until some time in April, 1831, when on motion of Coleman Duncan the Court made an order, of which the following is a copy: "Ralph v. Coleman Duncan." "It is ordered by the Court, that Ralph the plaintiff in this case be delivered by the Sheriff to James Duncan or to Coleman Duncan on their or either of them entering into a recognizance with sufficient security in the sum of six hundred dollars, conditioned that the said Ralph the petitioner shall at all times during the pendency of this suit have reasonable liberty of attending his counsel, and that the said Ralph shall not be removed out of the jurisdiction of this Court, and that he shall not be subject to any severity of treatment because of his application for freedom." The Court farther finds that said James d d, with Robert Duncan as his security, in April, 1831, enter into a recognizance agreeably to this order, and that thereupon the Sheriff of St. Louis county did deliver Ralph into the possession of James Duncan and that James Duncan delivered Ralph to Robert Duncan in April or May, 1831, and that Robert Duncan kept and detained Ralph as the slave of Coleman Duncan until March or April, 1832, and that the services of Ralph, while thus kept, were worth the sum of \$100. (336) The Court further find, that in the spring of 1832, Robert Duncan hired Ralph to one Lawrence as the slave of Coleman Duncan; that Ralph worked with Lawrence at seventy-five cents per day till his wages amounted to \$50, which sum was paid to R. Duncan for the hire of Ralph. The Court also find that in the suit commenced by Ralph against Coleman Duncan as aforesaid, judgment was rendered by said Court at the November term thereof, 1833, and that by that judgment Ralph was declared to be free, and that he was liberated as to the said Coleman Duncan and all persons claiming under him. Whereupon the Court gave judgment for the defendant in the Court below.

But one question is raised by the parties in this case, which is, can the plaintiff, under these circumstances, maintain an action of trespass and false imprisonment, and give the wages in evidence.

To prove that this position is correct, no authorities have been cited on either side, both parties rely on the general principles of law as applicable to his side of the case.

Gordon v. Duncan.

Mr. Geyer for the defendant contends, that in this case the party had a right to the possession and service of the plaintiff by authority of the law, and that in every such case, no action of false imprisonment will lie. He likens this case to a case of temporary indentures, &c.

On the other side, Mr. Bird for the plaintiff insists that the order of the Court after the first order was made, was void and without authority. We are inclined to this opinion; but we think let that matter be determined either way, still the question must not and cannot depend on the right of the Court to make the order when it did. In our opinion the whole question is this, was the plaintiff free at the time the defendant had him in possession? If he was, then he is entitled to recover. It is true that in every such case, nothing more than wages ought to be allowed, nothing for indignity, inasmuch as the person claiming the slave might well suppose the plaintiff was a slave; but if a case should arise where the defendant well knew he had no right to the plaintiff as a slave, and the act on his part was wanton, fraudulent and wicked; we see no reason why vindictive damages might not be given; but (387) we have no evidence of that kind in this case, nor is that a question now. Suppose an action of assumpsit were brought instead of the present one, might not the defendant object that the plaintiff was put into his hands by the Court and the law, and therefore no promise would arise on his part? We think he might, and it would be no more clear in such case whether assumpsit or trespass would be the appropriate action than it now is. Are we to understand the defendant that no action at all will lie? If this is his argument, we cannot sustain such doctrine. If it were doubtful whether assumpsit or trespass should be preferred, that would be a good reason to allow the present action, the plaintiff having used it and the Court not being able to determine he has been wrong in his selection. But the truth is, false imprisonment is the right action as seems to us; the plaintiff was imprisoned and all the Court did was to provide a security that the plaintiff should be forthcoming for the purposes of the suit; no change was made as to the right of freedom and slavery. Now if the plaintiff should sue the Sheriff for the time he had him, the Sheriff might well say he only acted in obedience to the order of the Court, and that would protect him as a trespasser. Yet in assumpsit he might be compelled to pay over the money, if the plaintiff shall establish his freedom, for in that case the statute expressly says he shall do so. We cannot see in what way any principle of law is violated by allowing the present action to prevail. We are therefore of opinion the judgment of the Circuit Court ought to be reversed, and the same is reversed; and this Court proceeding to give such judgment as the said Court ought to have given, do find the defendant guilty in manner and form as alleged in the plaintiff's declaration. And as to the second plea of the defendant above pleaded, this Court find that said Ralph is not and was not a slave as alledged by said plea. We assess the plaintiff's damage to the sum of one hundred and fifty-three dollars, &c.

(388)

JONES v. RELFE, ADM'R OF STEPHENS.

A return of the service of a petition and summons in these words, viz : "served the within writ of petition and summons on Augustus Jones, by giving a true copy of the same to him in Caledonia, Bellevue township, October 26th, 1833, J. C. Johnson, Sh'ff," is sufficient.

APPEAL from the Circuit Court of Washington county.

TOMPKINS, J., delivered the opinion of the Court.

Relfe sued Jones by summons and petition according to a statutory provision, and had judgment by default; Jones moved the Court to set aside the judgment, assigning for reason that the petition and summons had not been served according to law. His motion was overruled, and he appeals to this Court and assigns for error,

First. That the summons is insufficient.

Second. That the petition and summons was not served as required by law.

First. The sufficiency or insufficiency of the summons was not submitted to the decision of the Circuit Court; on looking into the record we find there is a summons and as the Circuit Court was not required to pass on it, we will not pry into it for defects merely formal.

Second. The return on the writ is, "served the within writ of petition and summons on Augustus Jones, by giving a true copy of the same to him in Caledonia, Bellevue township, Oct. 26th, 1833 : signed J. C. Johnson, Sh'ff." It is contended that the return ought to show,

First. That the Sheriff gave the defendant a copy of the writ and a copy of the petition.

Second. That Caledonia and Bellevue township are in Washington county, and they not being stated to be so, the return ought to be considered as if those places had not been named.

Third. That the return ought to show that the writ was executed by the Sheriff of Washington county.

First. We are of opinion that the language of the return shows with sufficient certainty, that a copy of the petition and a copy of the summons were given to the (389) defendant by the Sheriff. We know our law recognizes no writ called a petition and summons, and we also know that the summons is required to be sent out with the petition by the Clerk, of which summons and petition the Sheriff is required to deliver a copy to the defendant. We will therefore reject the words "writ of," and the return will then read thus, "served the within petition and summons;" &c., which is a very good return. The rejection of the words "writ of," is not unreasonable, for they mean nothing where they are.

Second. We will not presume facts to make a Sheriff guilty of a breach of duty; but we will presume that such places as Caledonia and Bellevue township are found in his county. If any one is injured by a false return of such facts, he has his rem-

Jones v. Snedecor.

edy. The case of Charless and Marny, cited to support this objection, is not in point. In that case the Constable returned the writ, was served "according to law," and it was decided that the return ought to show how and where it was served, as the law reserved to the Court the right of deciding whether it were lawfully served. The law required the officer in his return to state where he served the writ as a check on him, that it might be more easily ascertained whether he charged too much for travelling to serve process; a reason which no longer exists.

Third. The writ being directed to the Sheriff of Washington county, it would be a violent presumption that some other Sheriff had served it; this objection is also we think ill founded. We are then of opinion that the judgment of the Circuit Court ought to be affirmed.

(390)

JONES & JONES v. SNEDECOR, ADM'R.

1. A bond executed to a person as administrator, is an admission of his representative character, and the obligor cannot afterwards deny the obligee is administrator.
2. When two or more issues are joined, it is error to omit finding on any of them, otherwise if the issues are immaterial. (Note a.)

APPEAL from the Circuit Court of Washington county.

TOMPKINS, J., delivered the opinion of the Court.

This was an action commenced against the appellants in the Circuit Court of Washington county, by petition and summons, on a bond given to the plaintiffs below, naming them Parker Snedecor, adm'r, and Jane Peery, adm'x, of Andrew Peery, dec'd. The defendants pleaded,

First. Payment with a notice of set-off.

Second. That the wife of Myers Jones, one of the defendants, was a distributee of the estate of Andrew Peery, the plaintiffs' intestate.

Third. A set-off.

Fourth. That the plaintiffs were not administrators, &c.

To the first plea a replication was filed and issue taken; to the second there was a demurrer; and a replication and issue taken on the third; and issue was taken on the fourth plea. The demurrer to the second plea was sustained. The matters in issue on the three other pleas were submitted to the Court, neither party requiring a jury. The Court found the defendants indebted to the plaintiffs in the sum of two hundred and twenty-one dollars, the debt in the petition mentioned, and assessed their damages to \$23 36.

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No issue was found on the fourth plea, nor on the third. It will be observed that the defendants below, appellants here, gave their bond to the plaintiffs as administrator and administratrix, and even had it been given to them as administrators of the intestate, they need not have sued in their representative character; and the appellants have in the bond admitted the plaintiffs to be administrators.

The issue joined then on the fourth plea is immaterial, and it is no error that such issue is not found. So much cannot be said of the issue joined on the third plea, (391) which is a plea of set-off; it is certainly error that there is no finding on that issue. The judgment of the Circuit Court is therefore reversed, and the cause remanded.

(a.) See *Pratt v. Rogers*, 5 Mo. R., 53.

The finding may be in general terms, as "we the jury find for the plaintiff, and assess his damages to the sum of," &c. *Stout v. Calver*, 6 Mo. R., 255.

MARTIN v. LONG, ADM'X OF LONG.

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1. In creating a fee simple in estate in lands by deed, words of perpetuity, as are necessary.
2. In an action on a covenant of seizin of a life estate, the purchase money with interest is the measure of damages.

ERROR to the Circuit Court of St. Louis county.

M'GINK, C. J., delivered the opinion of the Court.

Sarah Long, administratrix of B. Long, brought an action of covenant against Martin, for a breach of a covenant of seizin. Judgment by default was taken, and on the execution of the writ of inquiry, the defendant appeared and took a bill of exceptions. The plaintiff's declaration is in substance as follows: that on the 30th day of Dec., 1828, the said Martin by his deed poll, for and in consideration of the sum of \$1,000 to him in hand paid by said B. Long, granted, bargained, and sold, and conveyed unto the said Long a certain tract of land in the county of St. Louis, (setting out the boundaries,) con'taining 75 acres 32-100; also one other tract adjoining the before described tract, bounded as follows: beginning in the westwardly boundary of the before mentioned tract at a rock, &c., setting out the boundaries as before, containing 46 acres and 65-100, making in all 121 acres and 97-100, the last described tract being a part of the original survey of Wm. Griffin. The lands by the said deed conveyed being three-sevenths of 328 arpents, which descended to the children of John Whitset and his wife Phebe, which said lands the said Martin pur-

Martin v. Long.

chased of Owen Wingfield, who married one of the heirs, and acquired the other (392) two-thirds or shares by purchase from Mitchell Hatton and Isaac Votau, who married two of the heirs of said Whitesides. And the said Martin in and by said deed covenanted with said Benj. Long that he was seized of a good and perfect title to said lands, and that he would warrant and forever defend the title to the same, &c. The declaration then avers for breach, &c., that Martin was not seized, &c. On the trial the defendant moved the Court to instruct the jury, that the measure of damages was not the consideration money and interest, but only such damages as he proved he actually sustained, which the Court refused to give; but instructed the jury that the measure of damages would be the consideration money and the interest thereon, which opinion and instruction were excepted to. The only question for us to consider is, what shall be the measure of damages in such a case as this. It is admitted that such is the rule as above laid down by the Court, where the party had at the time of making the deed, no estate in the land; but it is insisted by Mr. Gamble for the defendant, that by the declaration in this case, it appears the plaintiff only sold a life estate in the land, and that then the covenant of seizin is only a covenant of seizin of life estate. He then contends that although the default admits this covenant is broken, yet the plaintiff by his own declaration in setting out the deed, shows by the recitals in the deed that Martin has in fact a life estate in the land. We are clearly of opinion that Martin only sells a life estate, he uses *no words of perpetuity*, the word heirs is wanting. We are also satisfied that the covenant of seizin is as large as the life estate, and no larger. He has also clearly admitted by his default, that the covenant of seizin of that life estate is broken. Now what should in justice be the measure of damages; no rule appears to be less unjust as to the covenantor, than that he should at least pay the money back which he got for the land, which he did not own, and that he should pay no interest thereon. This rule has been applied to the case; but the defendant says the plaintiff has shown that in truth he had a life estate in the premises, and so his covenant is not broken. Let us look into this matter (393). The plaintiff alleges that the last mentioned piece of land is the same land which Martin purchased of Votau and Winfield, who married two of the heirs of Whiteside, deceased; hence the defendant concludes that the plaintiff means to affirm by these words, that Martin held from them and sold to him only the estate which he purchased of Votau and Winfield, and that Winfield and Votau were by the marriage tenants for life, and that they are yet living; that therefore the estate they sold to Martin still subsists, so no breach of the covenant. We are well satisfied that the plaintiff only mentions these people with a view more clearly to show what land he had bought and not what title. The covenant declares the title is good and perfect, and that the grantor is seized; this must be true under the covenant, whether he purchased from Votau and Winfield or not. Let the judgment of the Circuit Court be affirmed.

JAMES & MASSEY v. SNELSON.

1. The property acquired by settlers on public lands is novel in its character, peculiar to the Western States, and is not like that of a bailee or trustee. Nor is the possession of such settlers, that of mere wanton trespassers or wrong doers.
2. J. and M. cut and corded on the public lands a quantity of wood ; S. afterwards purchased from the government the land on which the wood had been cut and corded, and took it away : held that J. and M. may, in an action of trover against S., recover the value of the wood. (Note a.)

ON ERROR from the Crawford Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of trover brought in the Crawford Circuit Court by the plaintiffs in error, against the defendant in error, for a quantity of cord wood. The defendant pleaded not guilty and had a verdict and judgment, to reverse which the plaintiffs below now prosecute their writ of error in this Court. At the trial two (394) bills of exception were taken, from which it appears that the facts are, in substance, that Snelson, the defendant in error, lived on public land in the neighborhood of iron works belonging to the plaintiffs, who being desirous to cut down wood to be made into coal for the use of their furnace, sent an agent for that purpose to Snelson's house and informed him of the fact : Snelson said he wished to reserve three or four acres for a patch to his own use, and went with the plaintiffs' agent and marked out the ground he wished reserved : the plaintiffs then proceeded to cut the wood, and during the months of January and February, 1833, did cut and cord up five or six hundred cords, about 120 or 130 of which were cut on the three or four acres which Snelson had expressed a wish to reserve. The wood so cut and corded remained upon the land until some time in the spring of 1833, when the plaintiffs' agent went to the place where the wood was, to make preparation for converting it into coal ; the defendant then informed him that he had entered the land and claimed the whole of the wood, and warned him not to meddle with it at his peril. It appeared that the defendant had used a portion of the wood and claimed all the balance because he had entered the land. That the defendant on the 16th of March, 1833, paid to the Receiver of the Land Office at Jackson, fifty dollars in full for the south-east quarter of the south-west quarter of section No. five, township No. thirty-seven, north, of range No. five, west, containing forty acres, and took his receipt for the money so paid, which receipt was read in evidence upon the proof of the signature of the Receiver by the deposition of a witness. A witness also swore that the wood in dispute was cut upon the identical forty acres entered by Snelson, but could not state in what township or range the forty acres entered by Snelson were situate. Upon this state of facts the counsel for the defendant moved the Court to instruct the jury to find a verdict for the defendant, which instruction was given by the Court to the giving of which the plaintiffs objected and excepted. The counsel

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for the plaintiffs then moved the Court to instruct the jury that although they might (395) believe from the evidence that the wood was cut and corded upon the land which was afterwards entered by the defendant, such entry did not give the defendant any right to the wood which was so cut and corded up and then in possession of the plaintiffs, which last instruction was also given. The deposition of the witness, proving the signature of the Receiver to the receipt given in evidence, as also the receipt itself, was objected to by the counsel for the plaintiffs on the trial in the Circuit Court; and several questions have been raised in this Court, growing out of their admission, which need not be noticed, since the questions arising out of the instruction given for the defendant, dispose of the matter.

First. Was the possession of the plaintiffs of the wood cut and corded up, such possession as will maintain trover, for property, the title to which arises from the bare possession?

Second. Did the proof of title in the United States, to the land on which the wood was cut and corded up, at the time it was so cut and corded, defeat the plaintiffs' right of action? These are questions of great interest to this community: the magnitude and importance of which can be duly appreciated by those only who know or will look to the condition of the new States. The counsel on both sides have argued them with great ability. For the defendant in error it is contended, that the law regulating the action of trover is old and well settled; that the plaintiff in trover must prove property in himself; that possession is but *prima facie* evidence of title which is rebutted by proving property in a third person, or that the possession on which the plaintiff relies was acquired tortiously; that in this case the plaintiffs were committing trespass in the act of cutting the wood, and could not therefore acquire property by their tortious possession; or else, that the property in the wood remained in the United States, being owners of the land on which the trees were growing at the time they were cut down, and the title to the trees continuing in the wood cut and corded up; or else, that the plaintiffs must show actual possession of the wood, within some enclosure, or such possession as springs from showing title (396) to the land on which it was cut and corded in order to maintain their action, &c. For the plaintiffs in error it is insisted, that trover will lie wherever trespass will; that a qualified or special property is sufficient; that such a property arises out of every peaceable possession; that possession is sufficient against a mere wrong doer or stranger, and against all the world except the true owner; that it is not sufficient merely to prove property in a third person in order to defeat the action, but that it must be shown also, that the title of such third person is adverse to and inconsistent with the right of property as derived from peaceable possession; that whoever is answerable over to the true or general owner, may maintain the action; that bailees, carriers, the finders of goods, certified bankrupts, &c., may maintain trover, and that upon this principle one trespasser who has obtained possession may recover against another; that the policy of government has been uniform to encourage rather than punish those who make settlements on public land; that although such settlements are made without authority of law, and are, strictly speaking, trespasses, yet that such trespasses (so styled in the law) are always waived, or seldom if ever complained of, but on the contrary are regarded with favor and become the meritorious cause of securing to the trespasser the right of the soil at a reduced price. Hence arise our pre-emption laws enacted and extended from year to year, &c., &c. Nu-

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merous authorities have been cited by counsel on both sides in support of their respective positions ; we shall not attempt to examine and apply or even to note them.

The principles of the law as settled in England and the old States, are well established ; the difficulty we experience arises from the novelty of the subject and the proper application of settled principles to it. The possession and property acquired by the (osty'e!) trespassers on public land are new in the law, are peculiar to the new States, and have not been known in the English Courts. The qualified or specific property is not that of the bailee or a trustee expressed or implied as defined in the books, nor is the possession that of a mere wanton trespasser or wrong doer.

(397) In most of the new States, the title to four-fifths of the soil is yet in the United States. Many of our most flourishing settlements are mostly or in great part on public lands. Rich mines are discovered and industriously wrought from day to day where not an inch of the soil has been parted with by the government, nor even a chain stretched towards the preparatory surveys which are deemed necessary to the proper disposition of the public domain. What would be the consequence if the produce of labor so circumstanced, the possession of mineral dug up, of crops cultivated, of wood cut and corded, &c., were left to be scrambled for and seized upon by the strong or cunning without the help of law? It is manifest that a sort of predatory war would soon be waged throughout our frontier settlements. We think then that the better doctrine will be to allow a recovery in such cases, and leave the first trespasser to answer over to the government. The judgment of the Circuit Court is therefore reversed with costs, and the cause remanded.

TOMPKINS, J., dissenting.

In my opinion the appellants were trespassers from the beginning, and being such had no right of property in the wood, and having no right of property could have no right of possession so long as it lay on the land of the United States, unless they stood over it to maintain such possession, or enclosed it with a fence and kept possession of the close, and therefore could maintain no action at all on the evidence here given.

(a.) See Turley v. Tucker, 6 Mo. R., p. 583, in which this case was overruled.
Gale v. Davis, 7 " " 544.

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McGILL v. LEDUC.

1. The statute simplifying proceedings at law is highly remedial.
2. Quere—Can an administrator sue by petition and summons? If he can, he must by proper averments in his petition set out and show his right to do so. (Note a.)

ERROR to St. Louis Circuit Court.

WASH., J., delivered the opinion of the Court.

The defendant in error sued the plaintiff in error in the Circuit Court, by petition and summons, and got judgment, to reverse which the present writ of error is prosecuted. In the Circuit Court the defendant filed a plea, which was demurred to and overruled. On the demurrer the counsel for the defendant attacked the petition; and the question now presented to this Court is, whether the petition be good and sufficient to entitle the plaintiff below to have judgment. The proceedings are founded upon an act of the General Assembly, passed January 17th, 1825, entitled "An Act simplifying proceedings at law for the collection of debts," *Rev. Code*, p. 620. The petition pursues the form given in the statute, setting out that "Mary P. Leduc, administrator of all and singular the goods and chattels, rights and credits which were of Joshua Palen, deceased. Plaintiff states that he holds a note on the defendant, &c. It is insisted by the counsel for the appellant, that the plaintiff's right to sue as administrator of Palen, is not set out or shown, and that the petition is therefore bad and should have been so adjudged on the plaintiff's demurser to the defendant's plea. It is further insisted by the appellant's counsel, that an administrator cannot sue by petition and summons, inasmuch as the forms prescribed in the act do not admit of the averments required by law to entitle an administrator to recover in his representative character. To this it is answered by the counsel for the appellee, that the petition and summons law is a highly remedial statute, and was intended to afford a plain and simple remedy in all cases of plain and direct indebtedness evidenced by the writing of the debtor. That the object of the law is broad and comprehensive and its language universal in its application, and provides as well for an administrator as for any other lawful holder of a bond or note.

We do not feel called upon to decide whether an administrator may or may not sue by petition and summons. The statute was doubtless intended to be highly remedial and with the proper averments, made in such conformity to the statute, as the nature of the right intended to be asserted under it would admit of or make proper, an administrator would present a strong claim to the equity of the statute. The case under consideration however is a very different one, and the statute simplifying proceedings at law, must not be so construed as to repeal by implication that universal principle at the foundation of all our legal proceedings.

That the plaintiff must show his right to call on the defendant to satisfy or answer his complaint or demand. It may well be that Leduc administered in Illinois or in England so the petition would state the truth; yet it cannot be pretended that administration so obtained would entitle him to sue on the bond

Nat (a man of color) v. Ruddle.

as Palen's legal representative in this State. The judgment is reversed, the cause remanded.

(a.) See Baily, adm'r., v. Ormsby, post 580; Curle v. McNutt, 6 Mo. R., p. 495.

(400)

NAT (A MAN OF COLOR) v. RUDDLE.

In an action for freedom brought by a slave against his master, the Circuit Court instructed the jury, that if they believed from the evidence that the master took the slave into the State of Illinois and used him there as a slave, or permitted him to be used as such, they should find for the slave; but that if the slave went into the State on a mere visit, or ran away from Missouri to that State, he would not thereby be entitled to his freedom: and the Court refused to instruct the jury, that if they found that the slave went on a visit to the master's house and the master made no objection to such visit to Illinois, but employed him in planting corn and harvesting in Illinois, and permitted the slave to hire himself to labor in that State, they ought to find for the slave. Held, that the Court did not err in giving the one and refusing the other instruction.

APPEAL from the Circuit Court of St. Louis county.

TOMPKINS, J., delivered the opinion of the Court.

Nat sued Ruddle for his freedom, verdict and judgment for the defendant, and to reverse the judgment of the Circuit Court this appeal is taken. It appears on the record that the plaintiff produced on the trial, testimony to prove that some time in the year 1831, he was employed on the farm of the defendant in the State of Illinois to which place he was brought from Missouri, and that after staying some time in Illinois he was sent back to Missouri. Witness had seen Nat in Illinois in February and July of the year 1831, and if in the mean time he was absent the witness did not know it. It was also testified that Nat had been seen at Ruddle's assisting in planting corn and in the harvest. One witness swore that he had labored for Ruddle for which he was to have a return of as much labor, and that Nat came to perform it, but whether by Ruddle's order witness did not know: the plaintiff staid at one time in Illinois, after the month of July, 1831, a few months, and then returned to Missouri, and was seen while in Illinois about Ruddle's house and farm, and was generally reputed Ruddle's slave. On the side of the defendant it was proved that Ruddle removed from Missouri to Illinois in the year 1829, and left the plaintiff Nat hired out in Missouri, and that Nat ran away from Missouri and went to Illinois, and was frequently at his master's house on visits to the family. By both plaintiff and

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defendant, evidence was given that plaintiff hired himself out in Illinois; but there was no evidence that Ruddle received the hire.

The Court charged the jury to find for the plaintiff if from the evidence they believed that the defendant took the plaintiff into the State of Illinois and used him as a slave there or permitted him to be used as such, but that there was nothing in the soil of Illinois as in England, that would work the emancipation of a slave by mere setting foot thereon, and that if the plaintiff went into that State on a mere voluntary visit, or ran away from Missouri to that State, he would not thereby be entitled to his freedom. The counsel of the plaintiff then asked the Court to instruct the jury that if they found that the plaintiff went on a visit to the master's house and the master made no objection to such visit to Illinois, but employed him in planting corn and harvesting in Illinois and permitted the plaintiff to hire himself to labor in that State, they ought to find for the plaintiff. This instruction was refused. After verdict the plaintiff moved the Court to set it aside, and to be allowed a new trial, because the Court had given the first mentioned instruction, and refused the second, thereby misleading the jury to find a verdict against evidence. It has often been decided in this Court, that to entitle a slave to recover in an action of this kind, the slave must abide in the State of Illinois, by and with the consent, express or implied, of his owner, long enough to induce a jury to believe that the owner intended to make that country the place of the slave's residence. In the cases heretofore decided by this Court the slave has most commonly accompanied the owner, and in such case the right to freedom was decided to depend on the fact whether the owner did make Illinois his place of residence. The instruction given by the Circuit Court is even broader and more favorable to the plaintiff than the rule established by this Court. It is in these words, "if the defendant took the plaintiff into Illinois and used him there as a slave or permitted him to be used as such, then they should find for the plaintiff;" according to this instruction, the jury were unlimited as to time or the intention of the defendant. Whereas, according to the rule of decision of this Court, the jury were allowed to exercise their discretion both as to time and the intention of the party against whom the suit was brought. The instruction asked by the plaintiff's counsel was, we think, properly refused. If the visits of the defendant had been so frequent and his stay so long as to induce a belief that his owner intended them as a pretext for keeping the plaintiff in Illinois in violation of the constitution, the jury were authorized by the instruction given by the Circuit Court, to consider both the visits, and the labor performed, as well as the hiring proved, to go to establish the fact that the slave was taken to Illinois by his master, and there used as a slave. The jury had before them the whole evidence, with a correct and liberal direction from the Court, and the state of the evidence is not such as to induce this Court to disturb the judgment of the Circuit Court. Its judgment is therefore affirmed.

THE STATE v. McGUNNEGLE.

A single Justice of the Peace is not authorized to take a recognizance of bail from a person arrested under a capias issued on an indictment found in the Circuit Court.

ERROR to the Circuit Court of St. Louis county.

TOMPKINS, J., delivered the opinion of the Court.

This was a *scire facias* sued out on a forfeited recognizance. It sets forth, that the grand jury found an indictment against one James A. Collins for dealing as a vendor of merchandize without having a license. Collins being arrested by virtue of a *capias* issued on this indictment, entered into a recognizance before Peter Ferguson, a Justice of the Peace: the condition of the recognizance was to appear and answer (403) to the indictment, and McGunngle was his bail. To this *scire facias* McGunngle pleaded that the said Peter Ferguson, before whom the recognizance was taken and certified, was not, according to the laws of the State of Missouri, authorized to take and certify a recognizance in manner and form as in the *scire facias* set forth. To this plea a demurrer was filed and overruled. The question raised is, whether a Justice of the Peace is authorized to take the recognizance in such case as that set forth in the *scire facias*. By the 5th section of the act to regulate proceedings in criminal cases, provision is made that Judges of the Supreme Court throughout the State, Judges of the Circuit Courts in their respective circuits, and Justices of the Peace in their respective counties, shall have power to take recognizances of persons charged with any offence against the laws of this State, and to bind to the peace and good behavior.

The 6th section gives to the Circuit Courts power to issue process for the apprehension of all persons indicted in such Courts: the 7th section simply declares that a seal is not requisite to make a warrant good: the 8th, 9th and 10th sections provide for cases where the person charged with committing the offence is not found in the county in which the offence is committed. The 11th section declares it to be the duty of every Judge or Justice of the Peace, before whom any person shall be brought charged with any criminal offence, before he shall commit such prisoner to jail or admit him to bail, to take the examination of such prisoner and the information on oath of those who bring him, and all the witnesses attending, of the facts and circumstances, all which, with the warrant of commitment, or the recognizance, as the case may be, is to be certified to the proper Court having cognizance of the offence. The 13th section provides, that where any person shall be committed to jail for want of bail, or for not entering into recognizance, any Judge or two Justices of the Peace may take such bail or recognizance in vacation, and discharge the prisoner from confinement. One Judge may discharge the prisoner after he is committed; but it requires two Justices of the Peace to do the same act, for reasons obvious enough. (404) In the regular course of prosecution, the grand jury takes cognizance of this charge at the next term of the Circuit Court, and if they find the charge to be well founded, the law then presumes that the evidence of the prisoner's guilt is somewhat

The State *v.* McGunnegle.

stronger, and he is put on trial before the Court by a petit jury, who are to find him guilty or not guilty. But the case before us is that of one who for some immaterial reason was first taken notice of by the grand jury, and against him the law presumes also there is evidence sufficient to put him on his trial; a degree of evidence somewhat higher than that obtained against the person who had been committed to jail on the charge of a criminal offence. Can it be presumed that the law, after refusing to trust a Justice of the Peace with the power to take a recognizance when the probability of guilt was less, would do so when it was greater? The question is its own answer, but the correctness of the conclusion, that the Justice cannot take bail in such case, is more fully established by the provision made in the 6th section, viz: that the Circuit Court shall have power to issue process for the apprehension of all persons indicted in that Court. A *capias* issued to arrest a person indicted in that Court, is a warrant of commitment issued by it on the information of the grand jury, and consequently of higher authority than a warrant of commitment by any officer examining a prisoner and taking testimony under the provisions of the 11th section. It may be safely concluded, that if a single Justice of the Peace could not discharge from jail a person who had been committed after an examination according to the provisions of the 11th section, he could not stop the same prisoner on his passage to jail under the authority of such commitment, and discharge him on his entering into a recognizance. If, then, the Justice wanted power to take bail when the prisoner was on his passage to jail on the commitment of the examining officer, whether Judge or Justice, with what propriety can it be presumed that the law means to grant him such power when the prisoner is on his passage to jail on a *capias*, when the evidence is presumed to be so much stronger? The Circuit Court for the reasons above given, we think, committed no error in overruling the demurrer. Its judgment is therefore affirmed.

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O'FALLON, ADM'R OF MULLANPHY, v. BOISMENU.

1. If a person takes advantage of the absence of the owner of a tenement, takes possession of the same by trespass; or in other words, gets peaceably in possession and holds over by force, and underlets and receives the money of the sub-lessee; the owner cannot maintain assumpsit against him for money had and received.
2. Wherever money has been received, which in equity and good conscience belongs to another, it may be recovered in an action for money had and received.
3. To support an action for use and occupation, the plaintiff must prove that the defendant occupied under his permission, or some person under whom he claims; a stranger cannot try his title in this form of action: a demise expressed or implied must be proved.
4. It is error to give an instruction when there is no evidence to warrant it.

ERROR from St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

Boismenu brought an action of assumpsit for use and occupation against Mullanphy; judgment was given for the plaintiff. It appears that Boismenu had, from about the year 1827 or '8, by himself or tenants, occupied and possessed a certain house on Water street in St. Louis; that about the year 1828, one Daniel McGurin, now deceased, took possession of the house as the tenant of the plaintiff, and used and occupied the same as such tenant until his death, which happened about the first of December, 1830. That some time before the death of McGurin, and during his last sickness, John Mullanphy managed said property for McGurin, and immediately after the death of McGurin, Mullanphy exercised authority over and let the said house, and claimed to be the agent of McGurin's executor; that after the death of (406) McGurin, the house was let by Mullanphy to one James Wood, at different times. By the testimony of Wood it appears that in the spring of the year 1831, Mullanphy as agent let the house to him; that the rent was paid to the said agent; that in the spring of 1832, the witness wished to get the house for a year, and applied to Mullanphy for the same; that having heard that McGurin's lease was out, he mentioned this to Mullanphy, and Mullanphy replied, I know the lease is out and I expect to have a law suit with Boismenu, the plaintiff, but that the witness need not mind that, all he had to do was to pay the rent, and that Mullanphy would guaranty to him the possession; the witness thereon made a contract with Mullanphy to occupy the house for a year, to pay the rent to Mullanphy at the rate \$25 per month, and Mullanphy agreed and did cover the house and made some other repairs, without which the house was not in a condition to be occupied; that Wood enjoyed the house according to the lease, and paid the rent to Mullanphy; that before that time Mullanphy had always received rent as the agent of McGurin's executor. It was also proved that the rent paid before the last year, and before the repairs were made, was \$15 per quarter; that the rent of \$300 was paid to Mullanphy. When the plaintiff's evidence was closed, the Court instructed the auditors that the plaintiff

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could not recover on the count for use and occupation, but that he might go on the count for money had and received. The defendant's counsel then moved the Court to instruct the auditors, that the plaintiff could not recover on either count of his declaration, which the Court refused to do, but instructed the auditors that if they should find that Mullanphy, in making the contract with Wood in 1832, acted in good faith as the agent of McGurrin's executor, and not collusively, then the plaintiff is not entitled to recover in this action the money received by Mullanphy from Wood as rent; and that there was no evidence in the case to sustain an action for use and occupation; but that if they should find that Mullanphy took advantage of his previous agency to put Wood in possession as the tenant of Mullanphy, with intent by (407) this contrivance to hold possession adversely to the plaintiff, then the plaintiff is entitled to recover for the rent paid by Wood as money had and received.

Second. If the auditors find that the premises were let by Mullanphy to Wood for the whole of McGurrin's term, then it would amount to an assignment of the term; that Wood thereby became the tenant of the plaintiff, and that the plaintiff thereby became entitled to recover for money had and received for so much as Mullanphy received of Wood for the last year, which refusal and instructions given were excepted to. The auditors made their report and the defendant excepted to the report, the exceptions were overruled. The errors assigned are, the refusal of the Court to give the instructions asked, and the giving of those given.

There is but one question raised in this case, which grows out of the first instruction given by the Court on the part of the plaintiff, which question is this: that if a person takes advantage of the absence of the owner of a tenement, takes possession of the same by trespass, or in other words, gets peaceably in possession, and holds over by force, and underlets, and receives the money of the sub-lessee, can the owner maintain assumpsit against him for money had and received? To sustain this point for the plaintiff in the Court below, Mr. McGinnis cites several authorities. The view which the counsel for Boismenu takes of this point is this: that wherever money has been received by one party, which in equity and good conscience belongs to another, then that other is entitled to an action for money had and received, and to support this doctrine he cites several authorities.

It is admitted by the Court that this is the general rule, but the admission of this rule by no means settles the question before us. This rule does not embrace a case where an assault and battery is committed, and the wrong doer chooses to pay what he considers a compensation to B., a mere stranger. In our opinion this payment neither discharges A., the wrong doer, nor charges B., who receives the money, unless he receives the money by some authority from the injured party. Now it may (408) be and is true that the injured party has in good conscience a right to some money, yet it will hardly be said that he has a right to the particular money put into the hands of B. by A. the trespasser. The counsel then assumes this position, that wherever there has been a use and occupation by a party of the tenement of another, the law will raise a promise to pay for such use and occupation, and to support this point he cites 2 *Com. on Con.* 621, and 10 *Mass. R.* 436. We will examine these two authorities. The case cited by *Com.* was a case where the plaintiff had let for eighteen years, when he had in truth only two or three years interest in the thing demised; there was enjoyment for some time on the part of the defendant, and he had made preparations by expenditures to enjoy for the whole time; he refused to pay any rent; the Court decided that as he had been deceived and had rather been

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injured than benefitted by the lease and enjoyment, he was not liable to pay any rent. This case it is believed throws but little light on the question before us. The case cited from 10 Mass. R. is a case of this kind; a plaintiff in a real action recovered judgment of land, and was put in possession by the writ of the Court; the judgment was reversed, and the question was, whether he was liable in an action of assumpsit for use and occupation; the Court held he was, on the ground that having been put in possession by the writ of the Court, he could not be treated as a trespasser. The case before the Court is not like that case, whatever possession Mullanphy had, so far as there is any light on the subject, it was not under the plaintiff, but adverse to the plaintiff's right. Yet the Court lays down the law to be, that if it is true that the defendant got into possession peaceably, or forcibly held over in defiance of the plaintiff's right, yet it shall be considered a contract. Furthermore, in the case in Massachusetts it was said by the Court to be a new case, and on that ground; and as it was doubtful what his form of action should be, and inasmuch as he had chosen assumpsit, they would not turn the party around to bring another form of action.

Mr. Geyer, for the plaintiff in error, cites and relies on *Peake's Evidence*, p. 242, where it is said that the action of assumpsit for use and occupation, was introduced (409) by a statute of 11 Geo. II. Here we will remark that in terms our statute is just like the above statute of Geo. II. *Peake* cites cases and lays the law down to be, that to support this action the plaintiff must prove that the defendant occupied under his permission, or some person under whom he claims, for a mere stranger cannot try his title in this form of action, he must therefore prove a demise expressly or by presumption. *Peake* lays down the law correctly as we understand it. See also *Smith v. Stewart*, 6 J. R. 46; 2 H. H. R. 323. This view of the subject shows the first instruction was wrong. The Court should have instructed the auditors, that unless they found there was a contract between Mullanphy and the plaintiff, as to occupation, either express or implied, they must find for the defendant.

As to the instruction secondly given by the Court, it has not been argued at the bar. We think however there was no evidence on the record to warrant the instruction. We are therefore of opinion the Court erred. The judgment of the Court below is reversed; the cause is remanded for a new trial.

PAYNE v. SNELL.

If a defendant in attachment executes a bond, conditioned as the 2d sec. of the act amendatory of the law concerning attachments, passed Jan. 17th, 1831, directs, he thereby waives all objections to the attachment and proceedings under it, and the cause stands as though it had been commenced by an ordinary summons.

ERROR to St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

Payne brought an attachment against Snell. In his affidavit he stated that Snell (410) was about to remove his *property* out of the State. The statute says effects, not property. In the declaration the plaintiff declares for \$1,800; the plaintiff swears to a debt of \$600; the writ of attachment issued for \$1,800; the Sheriff attached property to the amount of \$1,800; whereupon the defendant gave a bond in a sufficient sum to cover the debt so sworn to, with costs and interest, thereupon the attached property was restored to the defendant. When the proceedings were returned to the Court, the defendant moved to quash the writ, because it issued for more than the amount sworn to in the affidavit.

Second. Because the affidavit did not pursue the statute, asserting that the defendant was about to remove his property, when it should have been his effects. The Court quashed the writ; the quashing of the writ as aforesaid is assigned for error.

The plaintiff in error also insists that although it may be that the proceedings may be erroneous in the above particulars, yet these objections come too late after the attachment has been, as it was in law, dissolved as an attachment, and stood as a common case on a summons. We are of opinion this position of the plaintiff is correct. The amendatory act of the General Assembly, passed 17th January, 1831, in the second section declares that if any defendant in any attachment shall give bond and security in a sum sufficient to cover the debt sworn to, with all accruing interest, damages, and costs of suit, conditioned that the defendant will pay to the plaintiff the amount of judgment which may be rendered against him in that suit, with all interest and costs that may accrue, &c., then in every such case the attachment shall be dissolved, the property taken restored, and all previous proceedings either against the Sheriff or against the garnishee set aside, and the cause shall proceed as if the defendant had been seasonably served with a writ of summons; all the law required to turn this case into an ordinary summons was done, when the motion was made to quash the attachment; there was in fact and law no attachment in existence. Then how did the objections taken by the defendant apply to the case? It is to be re- (411) marked that the writ of attachment contains in every case a clause of summons on the defendant; he then stood in Court on the summons; as to the summons and the declaration there is no discrepancy. In the case of ordinary summons there is no affidavit, and in this case all things else, (except the declaration,) which are required to constitute a good attachment, were superseded by the giving the bond on the

Williams v. Harrison.

part of the defendant. Suppose the writ so far as it was a writ of attachment is to be quashed, yet the law says in this case the party stands in Court on a summons, how is that to be got rid of? We think the party has, by turning the case into a case of summons, waived all objection to the suit as an attachment case, whether this was more for his benefit than it would have been if he had not done so, was for him to consider. We are well satisfied the Court erred in quashing the writ and proceedings. The judgment is therefore reversed; the cause is remanded for further proceedings.

WILLIAMS v. HARRISON.

3	411
60a	214
8	411
145	55

1. The practice of asking instructions from the Courts on abstract questions of law, and upon all matters of law and fact, (instead of presenting the precise questions and such only as arise from the evidence of the cause,) has been repeatedly and strongly reprehended by this Court. Such general instructions should rarely, if ever, be given.
2. Proof of words spoken in the third person, will not support a charge for words spoken in the second person, and so vice versa.
3. The plaintiff may prove the repetition of the slanderous words after the commencement of suit, in aggravation of damages.

ON APPEAL from the Washington Circuit Court.

WASH, J., delivered the opinion of the Court.

Harrison brought his action on the case against Williams for slanderous words and recovered a verdict and judgment, to reverse which Williams has appealed to this Court. The words laid in the declaration are well charged in the second person, "you stole two of my hogs." The words proved were, "he stole two of my hogs." (412) The plaintiff was permitted to prove the repetition of the slander after the commencement of suit by way of aggravation. On the trial the defendant moved the Court to instruct the jury to find for the defendant, which the Court refused to do. The plaintiff then moved the Court to instruct the jury, that if they should believe the charge in the declaration was supported by the proof in the cause, it was slander, and they must find for the plaintiff, &c., which instruction the Court gave. The errors assigned are, that the Court refused the instruction asked by the defendant, and gave the instruction asked by the plaintiff. This mode of asking instructions from the Circuit Court on abstract questions of law, and upon all the matters of law and fact, (instead of presenting the precise questions and such only as arise from the evidence in the cause,) has been repeatedly and strongly reprehended by this Court.

Wilder v. The State.

Such general instructions should rarely, if ever, be given. The questions arising upon the record and now presented for the adjudication of this Court, are:

First. Will proof of words spoken in the third person support a charge for words spoken in the second person?

Second. Can the plaintiff prove the repetition of the slanderous words after the commencement of suit in aggravation of damages?

It has been held by this Court in accordance with the doctrine as laid down by *Chitty* (1 vol. p. 334,) that slanderous words must be stated as they were uttered; and that the proof of words in the third person, will not support a count for words spoken in the second, and vice versa. On this point then, the law is with the plaintiff in error, and for this the judgment must be reversed. On the second point we think the Circuit Court decided correctly in permitting the plaintiff to prove the repetition of the slanderous words after the commencement of the action. The judgment of the Circuit Court is reversed with costs, and the cause remanded.

(413)

WILDER v. THE STATE.

The Circuit Courts have jurisdiction of assaults and batteries committed prior to the passage of the act of 18th January, 1831, declaring assaults, batteries, &c., not indictable offences.

ON ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

Wilder was indicted on the fourth Monday of November, eighteen hundred and thirty-one, for an assault and battery and pleaded not guilty. At the January term thereafter the cause was tried and a verdict of guilty found by the jury, on which the Circuit Court gave judgment, to reverse which, Wilder has come with his writ of error to this Court. The only error assigned and relied on for the plaintiff in error is, that the Circuit Court had no jurisdiction of the offence. It is contended that the act passed by the General Assembly on the 18th of January, 1831, declaring assaults and batteries not indictable, ousted the Circuit Court of its jurisdiction. Prior to the passage of that act, assaults and batteries were punishable by indictment at any time within the year after the offence committed. The act passed in January, and the indictment was found in November thereafter. Non constat, but the offence was committed prior to the passage of the act, and within the year. If so the indictment would well lie, and since nothing is shown to the contrary it shall be so

The State v. Simonds.

taken in support of the judgment. This same question was raised during the last term at Fayette, (in the case of Robinson and the State,) and was there so adjudged. The judgment of the Circuit Court is therefore affirmed with costs.

3	414
56a	534
3	414
186a	646
86a	647
86a	648
86a	649
3	414
164	614

(414)

THE STATE v. SIMONDS.

1. The General Assembly has power to incorporate cities, towns, &c., and vest them with authority to legislate in regard to their police.
2. An individual having been punished under the corporate authorities of the city of St. Louis, for keeping a Roulette Table, cannot be indicted in the State Courts for the same offence. (Note a.)

ERROR to the Circuit Court for St. Louis county.

M'GIRK, C. J., delivered the opinion of the Court.

An indictment was found against Simonds for keeping a Roulette Table and permitting a game of chance to be played thereon. Simonds pleaded that on a certain day before the finding said indictment, he was convicted and fined for the same offence before Wilson Primm, a Justice of the Peace for St. Louis county, which conviction took place under the authority of the corporation of the city of St. Louis. On demurrer to this plea the defendant had judgment. The point made and relied on by Mr. Mullanphy, counsel in behalf of the State, is, that by the Constitution of the State all legislative power is granted to and vested in a General Assembly, and that the General Assembly could not create a corporation vesting it with legislative powers, as has been done in this case, 3 art. and 1 sec. of the State Constitution.

It is true as a general proposition, that all legislative power is vested in the General Assembly, and whether that body can incorporate a city, as has been done in the city of St. Louis, we will proceed to inquire. The act incorporating the city of St. Louis, authorizes the Mayor and Aldermen to exercise legislative powers, and among others they have the power, by 12th section of the act, to regulate and restrain gaming and gaming houses. See *Rev. Code*, 201. Under this power the corporation impose a fine of \$500 for keeping a Roulette Table: by the 89th section of the act respecting crimes and misdemeanors, the same penalty is imposed for keeping any manner of gaming tables, &c.: see *Rev. Code*, 310. It would seem that all legislative power is given to and vested in the General Assembly by the Constitution. Yet we (415) have no difficulty in deriving satisfactorily from the Constitution, the power authorizing the corporation of the city of St. Louis to legislate and make police law to restrain and prohibit gambling, &c. In the first place we assume it as true, that

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no city of any size can at all get along without this power. We admit that the necessity of the case does not of itself form a sufficient reason why the power should be exercised if it is not given, or if it is denied; but it does form a reason why the power should not be denied unless it is clearly denied. At the time the Constitution of this State was formed, the town of St. Louis was incorporated with nearly similar powers to those now granted; the Constitution was formed in the town; the Convention sat and formed the Constitution in the bosom of the corporation, saw its effects and operations daily, yet they have used no where any prohibitory words regarding its powers or existence; but on the contrary, they have said and declared in the 2d section of the schedule to the Constitution, (61 of the R. C.) that all laws in force in the Territory, which are not repugnant to this Constitution, shall remain in force until altered or repealed. Not only the act incorporating the town as above mentioned was then in force, but there existed on the statute book of the Territory a general law authorizing the County Courts of every county to incorporate the several county towns when required by petition to do so, (see *Geyer's Digest*, 416.) If this power as it then was known to exist had been intended to be suppressed by the convention, when they declared all legislative power should be vested in a General Assembly, they surely would have used some words more clearly leading to the subject than they have, we might expect an express prohibition. But so far from any thing express on the subject by way of prohibition, they seem to have sanctioned the idea of the right and power of the Legislature to create such corporations as the city corporation is. The 5th section of the 13th article declares that no religious corporation can ever be established in this State, (69 R. C.) clearly indicating thereby that lay corporations may be established.

(416) We are of opinion, that under the foregoing view of the question, that the power to create corporations with powers to legislate in regard to the police of cities, towns, &c., is clearly to be implied. We, therefore, are of opinion, that the Circuit Court committed no error in rendering its judgment. The same is affirmed.

(a.) See The State v. Payne, 4 Mo. R., p. 377.

SHOLAR v. SMYTH AND OTHERS.

1. On a certiorari to bring up the proceedings of Justices under the act concerning forcible entries and detainers, the Circuit Court will look only to the record of the Justices, and set aside their proceedings for irregularity: the Court will not correct the errors in law, of the Justices, nor can a bill of exceptions be taken to their opinion.
2. Irregularity is error of fact or error of law appearing in the proceedings.
3. It seems to be the most convenient way to carry on the proceedings in these cases in the same manner as they are conducted in the Justices' Courts, without the formality of written pleas.
4. On certiorari bringing up the proceedings of the Justices under the act concerning forcible entries and detainers, the Circuit Court on setting aside the proceedings of the Justices, has no authority to remand them to the Justices, the functions of the Justices having ceased.

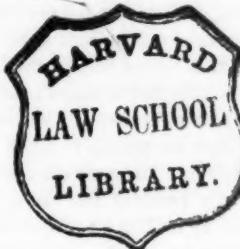
APPEAL from the Circuit Court of Washington county.

TOMPKINS, J., delivered the opinion of the Court.

Sholar brought his action under the statute concerning forcible entries and detainers before two Justices of the Peace of Washington county, and had judgment. Smyth and others, defendants, under the 11th section of that act, by writ of certiorari, removed the proceedings had before the Justices of the Peace, into the Circuit Court of Washington county, where, by the judgment of that Court, the judgment of the two Justices was *reversed and held for naught* for irregularity apparent on the face of the proceedings; a writ of restitution was granted to the plaintiff in certiorari, defendants before the Justices, and the cause remanded to the said Justices for (417) further proceedings. The 11th section is in these words, "that no appeal shall be allowed from the judgment of the Justices under this act; but the proceedings may be removed after judgment, by certiorari, into the Circuit Court, and there set aside for irregularity." When the cause came into the Circuit Court, the counsel for the defendants below assigned for error, that the Justices had not allowed the defendants to put in issue, by plea, facts that might in law have barred the plaintiff from recovering in this action, and material testimony had been excluded from the jury, all which was saved in a bill of exceptions. It is evident from the slightest perusal, that the act is designed to provide for a decision on the right of possession, and thereby prevent breaches of the peace. The 17th section provides, that "no judgment under or by virtue of this act shall be a bar to any other action at law brought by either party, either to try the right of property or for intermediate damages." Therefore in the 11th section above cited, it is expressly provided that no appeal shall be allowed from the judgment of the Justices under this act; but that the proceedings may be removed after judgment into the Circuit Court and there set aside for irregularity; it may be asked what purpose the act would answer if the cause were to be brought up on appeal to correct errors in law which Justices of the Peace might commit. The right of property as well as that of possession might be as soon deci-

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ded in the Circuit Court, if the errors in law committed by the Justices are to be corrected by that Court. The record of the Justices itself, without the aid of a bill of exceptions, brings up the irregularities, if any, which may authorize the Circuit Court to set aside the proceedings. Irregularity is error of fact, or error of law, appearing in the proceedings, that is, was there a summons, a judgment, a verdict, &c., and were they such as the act requires? No objection of this kind being made before the Circuit Court, this Court seeing then a summons, judgment, verdict, &c., will not look narrowly into the proceedings to see if they are regular. It may be added, that if the Justices had permitted pleas to be filed, although we cannot see any good (418) purpose it would answer, yet we are not disposed to believe it would have been an improper act. But the course which we believe the act intended to be pursued, is to give evidence without pleading as in cases before a single Justice. It certainly would answer the purposes of justice as well, and be more convenient. The Circuit Court certainly had no right to remand the cause for further proceedings before the Justices: they were no Court established by law, and when they had granted their writ of restitution, their functions ceased. The 9th section of the act itself plainly indicates this by providing, that if either party wish a new trial, it must be applied for on the day on which the verdict is rendered. The judgment of the Circuit Court is therefore reversed and the cause remanded, and that Court is directed to set aside its several writs of re-restitution, and to restore Sholar, the plaintiff before the Justices, to the possession, if he have been put out of possession by any writ of re-restitution issued by order of that Court in this proceeding, and to allow him all his costs incurred before the Justices and in that Court.



3	418
36a	121
3	418
42a	320
3	418
48a	580
3	418
61a	683
3	418
82a	342
3	418
92a	286

TIFFIN v. MILLINGTON.

1. Notice of an appeal from a Justice's Court must be in writing.
2. The Constable is not an officer authorized by law to serve process of the Circuit Courts, and consequently has no authority by virtue of his office to serve and return a notice of an appeal, without an affidavit of the facts relating to the service.
3. Notice of an appeal must describe the cause.

ON APPEAL from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

Millington sued one Armstead Lawless by attachment before a Justice of the Peace in which suit Tiffin was summoned as garnishee. Judgment was given by the Justice (419) against Lawless, and Tiffin was sworn and examined as garnishee, and had

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judgment entered up against him for the amount of the judgment recovered against the defendant Lawless. Tiffin appealed to the Circuit Court, in which the cause was dismissed from the docket for want of notice of the appeal; and from this judgment of the Circuit Court in dismissing the cause, Tiffin has appealed to this Court. Two points are relied on by the counsel for the appellee.

First. That the notice given was not a notice in the cause, but in a different cause.
Second. That the notice which was given was not served by an authorized officer, nor served in the manner required by law.

The notice given is in these words: Mr. Jeremiah Millington. Take notice that I have taken an appeal to the next term of the circuit, of St. Louis county, from a judgment rendered against me by Patrick Walsh in a suit wherein you was plaintiff and I was defendant. Clayton Tiffin. Nov. 12th, 1832." Upon which notice is the following endorsement: "Executed by reading this notice to the within named J. Millington in the city of St. Louis, Nov. 13th, 1832. J. Cooper, Constable, by D. Busby, D. C." The 23d section of an act establishing Justices' Courts and regulating the collection of small debts, *Rev. Code*, p. 481, directs that "the party appealing shall notify in writing the opposite party or his agent, &c." It is contended, however, by the counsel for the appellant, that this provision of the 23d section above cited is repealed by the 34th section of an act to regulate proceedings at law, *Rev. Code*, p. 630, which provides "that whenever in the progress of any cause a notice shall be required to be served, it may be served by any person being competent as a witness in the cause, and the affidavit of such person, sworn to before any competent person, shall be received as evidence of the facts therein stated, relating to the service, in the same manner as if stated in open Court; or such notice may be served by the Sheriff, or other officer of the Court authorized to serve process, and shall be evidence of the facts therein stated; and the services of such notices shall be in the same manner as in case of a writ of summons." This is the general law on the subject and does not profess to repeal any special law; the two enactments are perfectly consistent. The general law directs the manner of service in all cases not otherwise specially provided for. In such cases they are to be served as a writ of summons, (i. e.) by reading a notice or leaving a copy, &c. The case before us was specially provided for, and the notice should have been in writing. In a late case decided at Fayette, this point came up and was so ruled by this Court. Nor was the service made by an authorized officer: the person by whom the notice was served, was not the Sheriff, nor any officer of the Court authorized to serve process. The Constable of the city or township had no authority by virtue of his office to serve and return the notice, without affidavit of the facts relating to the service. Had the notice been in writing, it would not have been good without the proof of service required. If, however, the notice had been in writing and properly served or proved, the first objection taken by the appellee's counsel must have prevailed. It is obviously a notice which does not describe the cause, and belongs properly to some other suit between the parties. The Circuit Court did right, therefore, to dismiss the appeal, and its judgment is affirmed.

(421)

MATTISON v. THE STATE.

1. An indictment under the 43d section of the act concerning crimes and misdemeanors, which punishes counterfeiting coin current in this State, must charge the offence to have been committed "with an intent to defraud."
2. The Constitution of the United States having vested Congress with power to provide for the punishment of counterfeiting the securities and current coin of the United States, Congress and the States cannot legislate concurrently on the subject; the exercise of this power by the States is repugnant to the exercise of the same power by Congress; it is therefore exclusively in Congress, and consequently the 43d section of the act of the General Assembly of this State concerning crimes and misdemeanors, which punishes counterfeiting the current coin, is null and void.
(Note a.)

ERROR to the Circuit Court of St. Louis county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an indictment on the 43d section of the act of the General Assembly respecting crimes and misdemeanors, which section is as follows: that if any person shall counterfeit, or cause or procure to be counterfeited, any of the species of the gold or silver coins now current, or hereafter to be current in this State, or shall pass or give in payment, or offer to pass or give in payment, the same, or shall permit, cause or procure the same to be altered or passed, with an intention to defraud any person or body politic or corporate, being thereof duly convicted, shall be fined, imprisoned, &c. The indictment charges that the defendant did counterfeit a Spanish milled dollar, which was current in the State. On the trial the defendant was found guilty and judgment was given against him. A motion was made in arrest of judgment, for the cause that the indictment does not charge that the defendant counterfeited the Spanish milled dollar with an intent to defraud any person. The indictment is, as stated by the cause, in arrest. The Court overruled the motion. This is assigned for error.

To sustain the indictment, Mr. Allen, the Circuit Attorney, relies on the following argument. That the word counterfeit, *ex vi termini*, shows that the act was done with intent to defraud: to counterfeit means to copy or imitate without authority or right (422) and with a view to deceive or defraud by passing the imitation for the original. *Webster's Dictionary*, title counterfeit. Secondly, that by a view of the section in question, the words, with intent to defraud, are satisfied when only referred to the passing counterfeit money, without saying with an intention to defraud. As to the first point we are of opinion that the word counterfeited is not a technical term legally meaning that the act was done to defraud. The law requires every thing which is necessary to constitute the crime should be laid in the indictment. In this case we understand that the counterfeiting must be done to defraud and so laid in the indictment, by express words and not by circumlocution, 4 Bl. Com. 243. The rule is, that when the intent constitutes a part of the offence, the intent must be laid expressly in the indictment as well as the act to which it is to be joined. The next point is,

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whether the intent to defraud by counterfeiting is to be considered a part of the offence. This subject scarcely admits of any argument, it depends on the wording of the act and the arrangement of the sentences in the section; the first part of the section declares, that if any person shall counterfeit any Spanish milled dollar or pass the same, or cause the same to be passed with intent to defraud, &c., why the intent here mentioned should be restrained so as only to act on the passing we cannot conceive. We conceive the accumulative words *with intent to defraud*, attaches to all the preceding acts mentioned before it. We see nothing in the words nor the nature of the subject to forbid it. The judgment of the Circuit Court on this point is reversed.

Another point has been raised by Mr. Strother, counsel for the plaintiff in error, which is, that by the Constitution of the United States the subject of coining money and fixing the value of foreign coin, and to provide for the punishment of counterfeiting the same, is given to Congress, and that Congress has acted on that power by providing for the punishment of counterfeiting the Spanish milled dollars, therefore the State cannot. The reversal of the judgment on the first point in the cause will not necessarily entitle the prisoner to a release, the cause might be remanded and a (423) new indictment found; but if this last point is decided for him, no indictment which could be framed would be good, it therefore becomes necessary to consider this point. The Constitution of the United States declares that Congress shall have power to coin money, regulate the value thereof and of foreign coin, &c., and to provide for the punishment of counterfeiting the securities and current coin of the United States, 1 art., 8 sec., clause 5 and 6. By several acts of Congress, and particularly by the act of 1806, the Spanish milled dollar was made current money of the United States. By the 20th sec. of an act of Congress, passed 3d March, 1825, entitled an act more effectually to provide for the punishment of certain crimes against the United States and for other purposes, it is provided "that if any person or persons shall falsely make, forge or counterfeit, in the resemblance or similitude of the gold or silver coin which by law now is, or hereafter may be made current in the United States, with intent to defraud any body politic or corporate, or any other person or persons, every person so offending shall be deemed guilty of felony, and shall on conviction thereof be punished by a fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years. By the 43d section of an act of the General Assembly of Missouri respecting crimes, it is provided, "that if any person shall counterfeit, or cause or procure to be counterfeited, any of the species of the gold or silver coin now current, or hereafter to be current in this State, with an intention to defraud, &c., every person so offending, being thereof duly convicted, shall be imprisoned not exceeding ten years, be fined not exceeding one thousand dollars, be whipped not exceeding thirty-nine lashes, stand in the pillory two hours, and be rendered incapable of being a witness or juror, or of voting at any election, or of holding any office of profit, honor or trust within this State. The question to be decided by this Court is, whether under the laws and Constitution of the United States the Congress and the State can concurrently legislate on the subject of counterfeiting the current coin; provide different or the same (424) identical punishments for the same act, committed by a citizen. To be subject to two masters in respect to one and the same duty, is in its nature intolerable. Yet it is admitted, that one case arises out of the Constitution and laws of the Union, and the laws of the State where duties of a like kind must necessarily be required—

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that is, in the case of paying taxes.) The General Government may lay and collect taxes, and when this is done it forms no bar to a like demand on the part of the State. The General Government by special grant have a right to collect taxes from the citizens. This grant to Congress cannot, upon any sound rules of logic, be held to be exclusive in Congress and exclusive to the States, inasmuch as it would be unreasonable to suppose the States could intend to part with and grant away their essential means of existence: without money no State could exist. We have seen that the power to punish for counterfeiting the current coin of the United States has been expressly given by the Constitution to Congress. It is also declared by the 1st sec. of the 1st art. that all legislative power granted by the Constitution shall be vested in Congress, which shall consist of a Senate and House of Representatives, and by the 17th clause of the 8th section of the same article it is further declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. By the 2d section of the 6th art, it is declared that this Constitution and the laws of the United States which shall be made in pursuance thereof, &c., shall be the supreme law of the land: and again by the second section of the 3d art. of the Constitution, it is declared that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution and laws of the United States, &c. From this view of the Constitution I conclude that wherever the power is given to Congress to legislate on any particular subject or crime, they cannot transfer that power to any of the States, nor to any other Court than a Court (425) of the Federal Government. The act of Congress above referred to, in the last section provides that nothing in that act shall be construed to prevent the State Legislatures from providing punishments against the crimes therein made punishable.) It is argued by Mr. Allen, in behalf the State, that this proviso authorizes the State to legislate on the same subject.) My view of this matter is this, that Congress cannot, by any permission they may give, shift from themselves the duty of providing a punishment for counterfeiting the current coin, much less can they create a power on the part of the States to legislate on any subject, where they had none before. The Federalist, No. 45, has been cited to show that where the Constitution of the United States has given exclusive jurisdiction to Congress, as in the case of the exclusive jurisdiction given to legislate over the District of Columbia, then the States cannot legislate: and secondly, where the States are expressly forbidden, as in the case where they are forbidden to coin money, to emit bills of credit, &c., there they cannot act: and thirdly, where the power to legislate is given to Congress and is not forbidden to the States, yet if the exercise of legislation by both would be repugnant to the nature of a due exercise of the power on the part of Congress, then the States are forbidden to exercise the power, and that in all other cases the powers mentioned in the Constitution may be exercised concurrently. Supposing this classification to be correct, which I will admit is correct for the present, then how is the present power to be classed? Clearly with the third class. How can Congress exercise the power to punish counterfeiters, if at the same time the States can do the same thing? It is admitted that by the 5th art. of the Constitution of the United States no person shall for the same offence be twice put in jeopardy of life or member. The equity of this provision I think extends to cases where the punishment is less in degree than life or member. I think the provision extends to this case, where the pun-

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ishment by the law of the Union is fine and imprisonment; I ask how is this man to be protected from an indictment in the District Court of the United States? It is (426) answered by the Circuit Attorney, that he could in the United States Court plead this conviction in bar. Is it true that an acquittal, conviction or pardon, before conviction of and for an offence against the law of Missouri, is a good bar to an indictment for the same act created an offence by the law of the United States in a case where the Congress of the United States have a clear and admitted right to legislate and declare the punishment? If this is true, it must also be true that if the conviction takes place first in the Federal Court, then it would be a bar to a prosecution in a State Court where the State law makes the same act an offence against the State. Let us test the principle by the case at bar. In this case the punishment is not the same, although the act to be punished is the same by both laws. To make a former conviction good at common law, the cause of the prosecution must be the same in both actions; the judgment of law with regard to the degree or quantity of punishment should be the same also: now these coincidents are not likely to happen where the offender and the offence are subject to the separate action of two independent separate wills. In this case a portion of the respective punishments are alike, with regard to the imprisonment, in every thing else they are entirely unlike; the act of Missouri, in addition to the penalty of fine and imprisonment, imposes the pillory, disfranchisement, whipping, incapacity to be a witness, &c. How much, or how many of these items could be helden to be an equivalent for the discrepancy between the fine imposed by the act of Congress of not exceeding ten thousand dollars, and that imposed by our act of a fine not exceeding \$1000? [It appears to me the bare statement of the case is sufficient to show that no plea in bar would be sufficient to protect the citizen against the imposition of a double punishment.] In this case the United States having a clear right to declare the punishment, have declared it sufficient to impose fine and imprisonment. But the State has not been content with that punishment, but has added other heavy penalties. If the State can do this, why not impose still other and further penalties extending to death. But suppose (427) in this case the prisoner had been first indicted in the U. S. Court, found guilty and had judgment and execution upon him, then he is again indicted in the State Court, he pleads the former conviction, where shall our Court stop? Shall we only look at the act which constitutes the offence and stop there, or shall we add to the sentence of that Court all superadded by our act? I see no difference in this case and the case of the power granted to Congress to define the punishment for treason. In that case the Constitution does not prohibit the States from declaring what shall be the punishment for treason against the U. S. As the law of the United States now stands, the punishment for treason is death. Suppose the State should enact that if any person shall levy war against the U. S., &c., he shall be deemed guilty of treason against the State and shall be imprisoned one day and fined ten dollars. If a person should then levy war against the United States, should be convicted or acquitted by the State Courts, if this thing of pleading a former conviction in the case of counterfeiting is to be allowed, why not allow it in the last case put? If it is allowed, is it not obvious that a State opposed to the measures of the Union in war may effectively defeat the most righteous measures of the government. What could have prevented a portion of the Eastern States during the last war from paralyzing the arm of the Federal Government by this sort of legislation. Suppose again a State should be desirous to admit foreign goods free of duty. Now if the bar to be pleaded goes to the

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identical act prohibited by both governments, then this consequence would follow : the U. S. prohibit smuggling and declare the punishment to be a forfeiture of the goods and fine, &c.; the State forbids the act of smuggling also, but declares the punishment to be a fine of one dollar for each offence, without forfeiture. How completely this would be an evasion of the revenue laws, if a conviction or an acquittal under this State law would be a bar to a prosecution under the law of the United States. I put this case under the impression that a State is no where prohibited expressly from (428) inhibiting foreign goods into their ports, though they cannot lay duties nor imposts. I will now again recur to the case of treason by the Constitution of the U. S. The President of the Union has power to pardon offences against the United States. Now if it is true that the case of counterfeiting and that of treason can be concurrently acted on by both governments, then a pardon by a Governor of a State would be a bar to a future prosecution, whether the pardon was granted before or after conviction ; and so on the other hand, a pardon by the President would oust the State of its jurisdiction, unless indeed we are prepared to admit, the delinquent may lawfully be punished twice. I assume it as a postulate, that if the State has power to punish, the Governor has power to pardon ; the provision in our Constitution with regard to the pardoning power, is just like the power given to the President. It is furthermore my opinion that Congress ought not to exercise any powers which are not clearly granted to them as principal or incidental powers, and in all cases where it is doubtful in their minds whether a power is so given, they should forbear the exercise thereof; but that with regard to powers thus granted, they are bound to exercise them when expediency requires it to be done ; and that with regard to the States, I think they never should exercise a power clearly granted to the General Government where incompatibility exists, as in the present case, although the General Government should have failed to enter on the exercise thereof. It don't follow that because the Congress have neglected to occupy the power, that it may be occupied as a waif or thing lost, and that the States can use and keep it till Congress shall demand it. I am not prepared to admit the right of a State to punish the crimes committed against the United States. To punish crimes committed against a State, is an exertion of sovereignty ; and for one State to exercise any portion of the rightful sovereign power properly belonging to another, is a good cause of war if the other chooses to consider it so. If it does not, then the State so permitting is exercising toward the other a portion of sovereign grace. No State in this Union should (429) degrade itself so far as to receive grace from any other, and much less should a State be willing to become the mere executioner of the will of the United States, with regard to remnants of its will and power unused. Did any respectable Government ever yet undertake to execute the criminal code of another ; can the United States with any sort of decency execute the law [redacted] son and family belonging to France and England ? Crimes against the people [redacted] of those States, cannot be crimes against the U. S. If we ever undertake so, it must be undertaken as a job or piece of employment. Can the State of Missouri lawfully, if the United States were willing, choose to consider crimes done against the sovereignty of the latter, as crimes committed against her also, and in that way become the ministerial agent of the General Government ? Upon the whole of the premises I conclude that the power to punish the counterfeiting the current coin, is expressly by words given to Congress, and that by reason of repugnancy to the exercise of that power

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by the States, it is exclusive ; and that therefore the 43d section of the act of the General Assembly is void.

M. McGIRK.

I concur in the opinion that the fraudulent intent ought to be charged in the indictment. I also believe that Congress having by law imposed penalties on the offence of counterfeiting the current coin of the United States, the laws of the State passed since imposing penalties on the same offence are null and void, and any law that might have been passed by the State, before Congress acted on the subject, would have been superseded by such action of Congress. G. TOMPKINS.

In this case since the opinion was delivered, the counsel for the prisoner put into my hands Mr. Justice Story's *Constitutional Law*. I am happy to find my opinion fully supported, as to the exclusive jurisdiction of the United States, by that able jurist. See 3 vol. *Story's Constitutional Law*, p. 21. M. McGIRK.

My opinion differs from that of the Court. An indictment for a common law offence must describe it in such terms as are aptly used to define the offence ; but in (430) an indictment for a statutory offence, it is sufficient to charge it in the language of the statute ; if when so charged the indictment be bad, it will be because the statute is too vague and uncertain ; and in such case no formal words in the indictment will aid the statute. The indictment in this case is founded on the 43d section of the act concerning crimes and punishments. The offence it seeks to punish is created by the statute, and is described in the language of the statute. The indictment, I think, is therefore in this particular good enough. The Legislature might well conclude that the current coin would never be counterfeited without some fraudulent intent ; whereas the counterfeit coin might be often passed by individuals, not knowing it to be counterfeit or intending to defraud ; the knowledge and fraudulent intent should therefore be charged in an indictment for passing, but need not in an indictment for counterfeiting. Such I think is the true construction of the statute as to this point. I think too that the Legislature intended to punish and prevent the counterfeiting of such coins as constitute the circulating medium of the country, and not such only as are made or declared current by act of Congress. Current coin is one thing, current money another and very different thing. The coin most current in this country, and of which the counterfeiting would be most injurious to the community, is not money or coin made current by act of Congress. The constitutional question which has been raised, is full of interest and difficulty, and deserves much more labor and research than I have been able to bestow upon it. Without attempting therefore to enter minutely into the argument, I shall content myself with a concise statement of the principles I maintain and the views I have taken, and upon which I hold that the State may constitutionally provide for and punish the counterfeiting of the current coin. All power belonged originally to the States or to the people. The United States derive their power from the Constitution, and like a chartered company can exercise such powers only as are expressly given, or are clearly incident to those which are so given. Where it can be reasonably doubted (431) whether a power has been granted or not, it may be safely affirmed that it has not been granted. The powers not granted are expressly reserved to the States respectively or to the people ; as residuums of original sovereignty not parted with or surrendered. Where powers had been called into action by the States prior to the formation of the Constitution, which were not wholly parted with, the residuums belong to the States ; the residuums of such as remained dormant at that period,

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abide still with the people. That the States retain the power of legislating concurrently with Congress, on all subjects over which they have not granted or surrendered to Congress an exclusive jurisdiction, or from which they have not expressly excluded themselves, or which in their nature do not belong to or originate with the General Government. And here let me remark that in the view I take of the subject, it matters not whether the Constitution be regarded as a grant of powers from the States, or more properly from the people; the contrary doctrine will leave the General Government (as it seems to me) without check or restraint to provide for the general welfare, as in its wisdom may seem needful and proper; will convert the recipient into the fountain of power, and make the attorney or agent superior to the constituent or principal. The power of punishing the counterfeiting of the current coin, belonged originally to the States, and had been exerted in legislation prior to the formation of the Constitution. How then, I will ask, has it been parted with? It is not pretended that the grant of this power to Congress is in its terms exclusive, or that there is any express prohibition to the exercise of it by the States; but it is argued that the power to punish the counterfeiting of the coin, must from the very nature of the subject and the character of the power, belong to and be exercised exclusively by Congress; that without any express grant it would belong to Congress as incident to the power to coin money and regulate the value thereof; that the value of the current coin can only be regulated and preserved by providing a uniform punishment for those who counterfeit and impair its value; that the State by its legislation on the subject might counteract and thwart the views and policy of the General Government; that Congress having legislated on the subject, no act of the State Legislature can exist and have effect consistently with the act of Congress, for if both laws correspond, then the State law is idle and inoperative, and if they differ, the act of Congress being superior repeals the State law; that two distinct wills cannot be exercised over the same subject at the same time, without coming into collision, &c. The force of this argument is not perceived, or if rightly understood, is not admitted. The same thing might be said of the exercise of concurrent jurisdiction in every case; and yet this is expressly provided for, and necessarily exists in many cases. We are not to argue from the possible abuse against the use of power; this would put an end to all government, inasmuch as the best may be abused or badly administered. The States are just as much interested in the currency now as they were before the formation of the Constitution. Though it may be conceded that Congress could more conveniently and efficiently regulate its value, so far as it may depend upon providing uniform and suitable punishments for counterfeiting. It is not however a question of convenience or fitness, but of right; and it may well be that it was deemed better for the States to retain in their own hands the inconvenient exercise of this power concurrently with Congress, than to surrender it to the General Government, who might not exert it efficiently; be that as it may, the power has not been inhibited to the States, but on the contrary by strong implication, has been purposely left with them. The 8th sec. of the 1st art. of the Constitution of the U. S., enumerates the powers granted to Congress, and the 10th sec. of the same art. enumerates the powers withdrawn from the States; the power to coin money and to provide for the punishment of counterfeiting are expressly granted, whilst only the power to coin has been withdrawn. If it had been intended to withdraw from the States the power to punish counterfeiting, is it fair to insist that it would have been mentioned along with the power to coin? If it be true that the subject

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(433) belongs exclusively to Congress, whether they have legislated on it or not, the States would have no right to touch it. It is just as important that they should have the power to punish the counterfeiting of other coins in use and circulation in the community, as of those made current money by express legislation; for the value of each being relative, to impair the value of one would of necessity impair the value of another. It is not perceived that the objections urged in this case against the exercise of concurrent jurisdiction by the States, are entitled to much weight, or that the difficulties apprehended are likely to arise. When once a subject has been passed upon by a competent power, that decision should be final, or subject to review and correction by the power only by whom it was made, and in the mode only provided or prescribed by that power or by the State or sovereign under whom that power is exercised. When one competent power has commenced to take jurisdiction, it cannot be interfered with or ousted of that jurisdiction, but must be left to decide freely: and that decision will bar any other or further prosecution for the same offence, by the same or any other power, and may be so pleaded. This is in accordance with the provision of the Constitution, "that no person for the same offence shall be twice put in jeopardy of life or limb." Such is the law of nations in reference to matters over which each nation has an equal right to adjudicate; and such is the law in separate States, where concurrent jurisdiction is given to different tribunals of the same State. Forasmuch, therefore, as neither the power, nor the occasions for its exercise, can be said to have originated with the General Government, or can be claimed as peculiarly appropriate to it, and as the power has not been granted exclusively to Congress, nor expressly withdrawn from the States, I hold that it may be rightfully exercised by the States.

R. WASH.

(a.) See *The State v. Shoremaker*, 7 Mo. R., 177.

Decisions of the Supreme Court of Missouri,

JACKSON DISTRICT, MAY TERM, 1834.

GOVERNOR OF MISSOURI, FOR THE USE OF EVANS, v. HAYS, BYRNE AND
OTHERS.

1. An administrator's bond executed in 1813, under the Territorial government, to the Judge of Probate, must (in 1830) be sued on in the name of the State of Missouri, she, by virtue of the act of 1825, concerning executors and administrators, being the successor in office for this purpose to the Judge of Probate within the meaning of the 4th section of the schedule to the State Constitution.
2. A prior and subsequent administrator of the same estate cannot be sued jointly on their separate bonds.

ERROR to the Circuit Court of Cape Girardeau county.

TOMPKINS, J., delivered the opinion of the Court.

Evans using the name of the Governor of Missouri, sued John Hays, George Henderson and others, in an action of debt. The defendants demurred and had judgment on the demurrer in the Circuit Court; and Evans here prosecutes his writ of error to reverse that judgment.

The declaration consisted of two counts; in the first count it is alledged that Daniel F. Steinbeck, Bartholomew Cousin and John Hays executed their bond dated 4th May, 1813, to George Henderson, Judge of Probate, for the sum of \$10,000, with a condition that said Steinbeck should duly administer the estate of Louis Lorimier, &c. In the second count it is alledged, that George Henderson, Morgan Byrne and William Garner, on the 31st Jan., 1814, executed their bond for the sum of twenty-thousand dollars, to Joseph McFerron, Clerk of the Court of Common Pleas for the (435) county of Cape Girardeau, conditioned that said Henderson, administrator of Louis Lorimier, with the will annexed, shall duly administer the goods, &c., remain-

Evans v. Hays and others.

ing to be administered, &c. The plaintiff then goes on to assign joint breaches of the conditions, of the two bonds above mentioned. By the defendants in error, it is insisted, first. That the legal interest of the first bond is in George Henderson, and that of the second is in Joseph McFerron. Second. That there is a misjoinder of parties in this action and of causes of action.

First. The two bonds were executed under the Territorial government. By the 4th section of the schedule to the State Constitution it is provided, that all bonds executed to the Governor of the Territory, or to any other officer or Court in official capacity, shall pass over to the Governor or other State authority, and to their successors in office for the uses therein respectively expressed, and may be sued for and recovered accordingly.

By the 10th section of the act establishing Circuit and County Courts, approved 28th Nov. 1820, all power of granting letters of administration, &c., is granted to the County Courts; but it is not provided that the bond shall be made to any particular person. By the 9th section of the act concerning executors and administrators, approved 12th January, 1822, it is required that bonds of executors and administrators shall be made to the Governor and his successors in office; and by another section, that suits on such bond shall be instituted in the name of the Governor. By the 9th section of the act approved 21st February, 1825, *Revised Code*, p. 95, such bonds are required to be executed to the State, and in a subsequent part it is provided that they shall be sued on in the name of the State. This is the last provision by statute; and this action being commenced in the year 1830, should have been in the name of the State. If we inquire into the meaning of the words, "successor in office," used in the 4th section of the schedule, we must confine it to the subject matter. The bond under the Territorial government was executed to the Clerk of the Court of Common Pleas, in 1822, under the State government to the Governor: he then must be (433) the successor in office, as to the subject matter of this inquiry: in the year 1825, bonds were executed to the State; the State, then, we think, become for the present purpose, successor in office to the Clerk of the Court of Common Pleas, to whom one of these bonds was executed, and also to the Recorder, to whom the other was executed; and we think the suit should have been in the name of the State.

The second point insisted on, to-wit: that there is a misjoinder of parties to this action and of causes of action, is for the defendants. It is almost needless to say that Henderson and his securities could not, on their bond, be made answerable for the acts of the prior administrator, who must necessarily cease to be administrator before Henderson began to be such. The judgment of the Circuit Court is affirmed.

M'GIRK, C. J., dissenting.

I concur in the above opinion as to the misjoinder, and as to the other points I dissent.

GARNER v. HAYS.

1. A scire facias served in the presence of two respectable persons of the bailiwick, is served in the mode prescribed by the statute.
2. The statute of 13 Edward I, giving a scire facias to revive judgments in personal actions, is in force in this State.
3. A scire facias to revive a judgment for costs may be issued pending a motion to re-tax the costs. A judgment for costs generally is good.
4. On a scire facias to revive a judgment, no declaration is necessary.
5. The want of a similiter in pleading is no ground for reversing a judgment.

ON ERROR from the Cape Girardeau Circuit Court.

WASH, J., delivered the opinion of the Court.

Hays, the defendant in error, sued Garner, the plaintiff in error, in the Circuit Court and had judgment for his debt and costs. Garner paid Hays the amount of his debt recovered, and refusing to pay the fees of the Clerk as taxed in his fee bill, (437) moved the Circuit Court to re-tax the costs: pending this motion to re-tax the costs, and after the expiration of the year and a day from the rendition of the judgment, a scire facias was sued out to revive the judgment; a motion was made to quash the scire facias, which was overruled; and it was adjudged by said Court that said judgment as to the costs recovered therein should be revived against said defendant; and Garner now prosecutes his writ of error to reverse this judgment on the scire facias. The errors assigned are,

First. That the scire facias was not legally served on the defendant.

Second. That there is no law of this State authorizing a scire facias to revive a judgment.

Third. That there was a motion depending and undecided in said Court, for re-taxing the costs in the original suit, and by the plaintiff's own showing, the amount of the judgment and interest in said suit was paid.

Fourth. That there was no declaration on the scire facias.

Fifth. That the judgment is too vague and uncertain, not being for any certain and specific sum.

Sixth. That there was no issue joined on the plea of payment which had been filed by the defendant to the scire facias.

As to the first error assigned, the writ was served in the mode prescribed in the statute, in the presence of two respectable persons of the bailiwick, &c.

As to the second error assigned, there is no force in the argument, that at common law, the scire facias was not allowed, and that the statute of 13 Edward I, in aid thereof, is not to be regarded as the law of this land; the reverse thereof is the truth.

There is nothing in the third error assigned. The judgment does not in any way affect the motion to re-tax the costs. Only such costs as were legal and proper could have been recovered under the original judgment, and such only are recoverable by execution on the judgment as revived: and this answers the fifth error assigned, for

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(438) the object was to have execution, according to the form and effect of the original judgment, and there was no need of more precision in the scire facias than was in the judgment. A judgment for costs generally is good. That is considered as certain which may be rendered so. On a scire facias to revive judgment, no declaration is deemed necessary, and the fourth error assigned is therefore without force. As to the sixth error assigned, the want of a similiter has been often held to be no ground for reversing a judgment. Upon the whole, therefore, the Circuit Court did right in refusing to quash the scire facias, and giving judgment as to the costs recovered in the original suit, and its judgment is therefore affirmed, with costs.

MAULSBY AND MAULSBY v. FARR.

1. A return to an attachment, not stating on what property in the hands of the garnishee the writ was levied, is too defective to warrant a judgment by default against the garnishee.
2. After a motion to set aside a judgment by default, it is too late to move for leave to amend the Sheriff's return to the writ.
3. If by a writ of attachment, the Sheriff is not required to summon any garnishee in particular, but he does so, he must in his return show what property of the defendant's he found in the possession of the garnishee, in order to justify the act of summoning him to appear and answer.

APPEAL from the Circuit Court of New Madrid county.

TOMPKINS, J., delivered the opinion of the Court.

S. H. & D. H. Maulsby sued George Farr in the Circuit Court of New Madrid county, and procured an attachment to be issued against the property of Farr. In this writ the Sheriff was not commanded to summon any particular person as garnishee ; but he summoned Robert Pollock as such, and Pollock failing to appear at the return term of the writ, judgment was entered against him by default. At a term subsequent to the entry of such judgment, Pollock came in and moved the Court to (439) set aside the judgment thus entered against him ; two days after, the plaintiff moved the Court for leave for the Sheriff to amend his return on the writ of attachment, the motion to set aside the judgment not being yet decided on. The Court set aside the judgment by default, and from the decision of the Court, setting aside this judgment by default, the plaintiff appeals. It does not appear by the Sheriff's return that any property of Farr was attached in the hands of the garnishee, but that the writ was served by reading it to Pollock, in presence of witnesses, &c.

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The third section of the act to provide a method of proceeding against absent and absconding debtors, directs that the manner of attaching the lands and tenements of such defendant shall be by the officer's going to the place where, or to the person who is supposed to be indebted to the defendant, or in whose hands or possession any lands, tenements, &c., may be supposed to be, and then declaring in presence of one or more creditable persons of the neighborhood, that he attached the same, and the manner of summoning the person in whose hands or possession the same may be attached, shall be by reading the said writ, or delivering a copy thereof to him, or leaving a copy, &c.

Now the failure to return on the writ, that the officer had attached lands, &c., in the hands of the garnishee, is clearly such a defect as would justify the Court in setting aside the judgment by default against Pollock. The question here arises, ought the Circuit Court to have admitted the amendment offered by the plaintiff? The amendment came too late. After the garnishee had applied to have the judgment set aside for irregularity, it was too late for the plaintiff to come in for leave to have the defect in the return of the writ amended. But had the amendment been offered in time, it is not such as in the opinion of this Court, ought to have been received. It is in these words, "and further then and there, at the same time I declared to the said Robert Pollock in his hearing in the presence of, &c." That by virtue of said writ, I attached all the goods and chattels, lands and tenements of the said George Farr, then in his, said Pollock's, possession. As he was not commanded to summon Pollock, but did so only by the general power granted in the writ, he ought to have shown that he had found property of the defendant in Pollock's hands, and what that property was, to justify the act of summoning him to appear to answer the plaintiff's action. The judgment of the Circuit Court is affirmed.

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APPEAL from the Circuit Court of New Madrid county.

TOMPKINS, J., delivered the opinion of the Court.

This case presents the same points as the case of Maulsby and Maulsby *v.* George S. Farr, with this single difference, that by the writ in this case, the Sheriff was commanded to summon Robert Pollock as garnishee. The motion to amend here, too, came after the motion to set aside the judgment by default, and was, therefore, correctly overruled by the Court. The amendment here offered was the same as that offered in the other case, and had it been offered in time, we are of opinion it was

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well enough, because the plaintiff in the action had directed Pollock to be summoned; and he having undertaken to know that Pollock had property of Farr in his possession, it was not necessary for the Sheriff to search for property which might be hidden, and which he might not have been able to find after the most diligent search. The judgment is affirmed.

(401) **LINCECUM AND MARTIN, ADM'RS OF LINCECUM, AND YOUNG, GUARDIAN OF LINCECUM, v. LINCECUM.**

1. In a case where a man marries in another State, and there is issue by that marriage, and subsequently by mutual consent the husband and wife part, and the man moves to this State and again marries, his former wife living, and has children by his second wife, the children by the second wife are deemed legitimate, and are entitled to distribution in the estate of the father by the following clause of the 8th section of the act, entitled an act to direct descents and distributions: that "the issue of all marriages deemed null in law, or dissolved by a divorce, shall nevertheless be legitimate."
2. The act directing descents and distributions, does not pretend to make lawful those marriages which were null before, but it acts prospectively with regard to the children then in being.
3. In the statute concerning divorcees, where the subject of legitimacy is mentioned, it is only done to prevent the fact of a divorce changing in any wise, the capacity of the children or issue, when it is granted.
4. The law respecting divorces can only operate in the case provided by the very act, upon the question of legitimacy, which is, where a divorce is granted in pursuance of the act, for the cause that there was a previous marriage.
5. A person once clearly and positively legitimated, ought not to be bastardized by implication or construction.

APPEAL from the Circuit Court of Cape Girardeau county.

M'GIRK, C. J., delivered the opinion of the Court.

It appears by the record that in the year 1802, Asa Lincecum was married in the State of South Carolina, to one Malinda Nevills; that in 1803 there was born of that marriage a daughter, who died without issue; that in 1805, Harman Lincecum, the appellee, was also born of that marriage; that in 1807, Asa Lincecum and his wife parted by mutual consent, and that the wife is yet alive and not divorced from her husband; that shortly after the separation, Asa came to Missouri and brought with him his son; that in 1810 he married in this country a second wife, had by that mar-

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riage two children, Isabella and Rezin; that in 1827, Lincecum died intestate, about which time the said second wife died also; that shortly afterwards administration was granted on his effects to H. Lincecum and A. Martin; that after the estate became ready for distribution, the said Harman Lincecum presented his petition to the (442) County Court of Cape Girardeau county, alledging the existence of the former marriage, as stated above, and praying the Court to order the remaining assets to be paid to him as sole distributee, deducting his mother's share therefrom. The mother and Harman Lincecum were the parties on one side, the administrators and guardian of the children by the last marriage were the parties on the other side. The County Court decreed and ordered that the distribution should be made to Harman Lincecum and his mother, in exclusion of the children of the last marriage. The parties appealed to the Circuit Court; when the cause came there, the Court set aside the decree and tried the matter over again, as to Harman Lincecum, taking no notice of the claim set up by the mother. The Court found for H. Lincecum and ordered distribution to be made to him, to the exclusion of the children by the second marriage. From this decree of the Circuit Court the parties have appealed to this Court. In this Court many points have been made by the appellants. We are of opinion that it will be useless in this case to decide all the points made in the case. The main point in the case, and the only one necessary to be considered is, whether the children of the second wife are entitled to an equal distribution with the issue of the first marriage. To prove that they are so entitled, Mr. Ranny, counsel for the appellants, cites and relies on the latter clause of the 8th section of the act of the General Assembly, entitled an act to direct descents and distributions, (*Rer. Code*, 328,) which clause declares as follows:

That "the issue of all marriages deemed null in law, or dissolved by a divorce, shall nevertheless be legitimate." The first section of this act declares that the residue of the estate of an intestate, after deducting the widow's right of dower, and after the payment of debts, shall be divided among his children. All will agree that these children must be legitimate children, and that none else can take. The counsel insists that this section completely sustains his case. We are of opinion that this clause of the 8th section of the act does cover this case, and that the children of the second marriage are entitled to share alike with the son of the first marriage. (443) Messrs. Watkins and Scott, for the appellees, contend,

First. That to extend the provisions of the 8th section to this case, would be to give the law a retrospective operation, inasmuch as all these marriages took place before the passage of the act, which was in the year 1825.

Our view of this point is, that though the second marriage took place before the passage of the act, yet at the time of its passage Harman Lincecum had no right on which the law could then act, either prospectively or retrospectively.

The act does not pretend to make lawful those marriages which were null before, but it does act prospectively with regard to the children then in being. It declares that they shall no longer be considered bastards. That they shall henceforth be capable of inheriting and taking a distributive share from their father or mother, when such parents shall die intestate, leaving property. In this case the act in 1825 fixed and declared what the capacity of the children should be, if the father should die intestate. In 1827 the event happened; this appears to us to be altogether prospective.

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The next matter urged by the appellees' counsel is, that the general words of this statute ought to be so limited and restrained as not to extend to this case, because to do so, holds out a reward to bigamy.

It is true that no statute where the words are in any wise doubtful, ought to be so construed as to be against morality and justice; but we conceive that principle does not apply in this. If this statute had sought to relieve the guilty father from the consequences of his departure from the line of duty, then there would be room for the operation of the principle; but that statute only seeks to relieve the innocent from the consequence of an unworthy act of their father, and this it does do, without violation to the vested rights of any one.

The law of the land allowed the father to dispose of his property, while living, as he pleased. It allowed him to make a will, and to say who shall enjoy the estate (444) after his death. This the father has not done, he has left it to the law to say who shall be the owner after his death. The law, in making the selection, has seen fit to point out the legitimate children of the intestate. It has also declared who are legitimate children. In all this we see nothing against morality and justice.

With a view to defeat the rights of the children of the second marriage to a share in the distribution, the counsel for the appellee cites and relies on the last clause of the 1st section of the act respecting divorce and alimony, R. C. 330, which says that when a marriage shall be celebrated, &c., and it shall be adjudged that either party was impotent at the time of the marriage, or that he or she hath knowingly entered into a second marriage in violation of the previous vow he or she made to the former husband or wife, and whose marriage is still subsisting, or that either party hath committed adultery, or has deserted, &c., it shall be lawful for the Court to divorce the innocent and injured party from the bonds of matrimony; but no such divorce shall in any wise affect the legitimacy of the children, except in cases where the marriage shall be declared null and void from the beginning. On the ground of a prior marriage, it is insisted, that these two acts are to be taken as one act, so far as relates to the question of legitimacy. If this is done, then the law will read that the children of all marriages, which are from the beginning deemed null, shall be legitimate, except where there was a prior marriage still subsisting. But in that case the issue of such second marriage shall be bastards, or not, as the general law will hold them to be. In the first place we are not prepared to admit that these two acts are so far *in pari materia*, that they ought to be taken as one act; the one is an act solely for the purpose of pointing out who shall take the estate of an intestate. The other is essentially an act to regulate the granting of divorces. It is true that the subject of legitimacy is mentioned in both. In the first act it is mentioned for the purpose alone of pointing out the children who shall take a distributive share of the intestate.

(445) In the latter act the subject is only mentioned to prevent the fact of a divorce changing in any wise the capacity of the issue or children when it is granted. The two savings in this latter statute were, no doubt, introduced with a view to prevent, on the one hand, legitimate issue from being bastardized; and on the other, to prevent those who would be bastards, without a divorce taking place between their parents, becoming legitimate by the divorce. It is true the divorce would not, if the exception had not been in the statute, have had that effect. But we think the Legislature put in the exceptions without intending to declare what the law would be without the exceptions.

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Another thing to be considered is, that the divorce law, if it does intend to prevent the issue in case of prior marriage from being made legitimate by the exception, yet the exception can only operate in the case provided by the very act making the exception, and that case is where a divorce is granted in pursuance of that act, for the cause that there was a previous marriage. The case before us is not a case of legitimacy arising out of a divorce case.

Another thing in this case is, that where a person is once clearly and positively legitimated, he ought not to be bastardized by implication or construction. That rule applies with force in this case. The act of descents and distribution clearly makes these children legitimate, and being once clearly so, if they are holden to be otherwise, it can only be by implication, argument and construction.

For the foregoing reasons the judgment of the Circuit Court is reversed; the cause is remanded to that Court for a new trial in conformity with this opinion.

WASH, J., dissenting.

In this case I dissent from the opinion of the Court, as to the effect of the provision in the 1st section of an act concerning divorce and alimony. It seems to me that it should be taken as an exception to the provisions of the 8th section of "An act to direct descents and distributions;" and that in order to give effect to both acts, the (446) provisions should be considered as if they stood embraced in the same section, and then it would read, "the issue of all marriages deemed null in law, or dissolved by divorce, shall nevertheless be legitimate, except in cases where the marriage shall be declared null and void from the beginning, on the ground of a prior marriage.

Decisions of the Supreme Court of Missouri,

FAYETTE DISTRICT, SEPTEMBER TERM, 1834.

PAVEY AND ORR v. BURCH.

1. Evidence introduced to show the rules established among brick-masons for measuring their work, illegal when it conflicts with terms of the covenant.
2. Covenants are to be construed according to the plain and obvious meaning of the terms used by the community at large, and not according to their meaning as used amongst brick masons, or any other particular class of men, who may understand them in a different sense.
3. When improper evidence has been admitted, the Court should exclude it in express terms, and it is not enough to do so by implication.

WASH, J., delivered the opinion of the Court.

This was an action of covenant, brought by Burch, the appellee, against the appellants, in the Boone Circuit Court, where Burch got a verdict and judgment; to reverse which judgment, Pavey and Orr have appealed to this Court. The covenant sued on by Burch, was for the building of the Court House in Monroe county. Burch undertook the job, and Pavey and Orr, (commissioners appointed in behalf of the county,) covenanted "to pay Burch seven dollars per thousand for making and laying the brick in the manner pointed out in the covenant, *counting the neat brick in the building.*"

The only question for the consideration of this Court, which has been raised and relied on by the appellants' counsel, grows out of the admission of certain evidence on the trial in the Circuit Court, which was objected to by the defendants below, and is now assigned for error.

Witnesses were introduced by the plaintiff below, who testified "that the rule (448) known and established among masons for measuring their work and ascertain-

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ing the number of neat brick in a building, was to ascertain the number of cubic feet, by multiplying the aggregate length of the walls from out to out, by the height of the story, and that product by the thickness of the wall, (which would give the cubic feet in the wall,) counting the corners twice; and then by multiplying the number of cubic feet thus ascertained, by twenty-two and a half, the product would be the number of neat brick," &c. It is clear this testimony was illegal and improper.

The covenant is to be construed according to the plain and obvious meaning of the terms used by the community at large, and not according to their meaning as used amongst brick-masons.

It is insisted, however, by the counsel for the appellee, that the instructions given by the Circuit Court to the jury on the trial below, "that the words of the covenant were to be construed according to their general import and meaning, and not according to the particular understanding of brick-masons, or any other particular class of men, who might understand them in a different sense;" and, "that by the written contract, the plaintiff could recover for no more brick than were actually in the building," &c. &c., did, in effect, withdraw from the consideration of the jury, the evidence improperly admitted. The instructions were, doubtless, very properly given, but do not go far enough to cure the error complained of.

The jury should have been told expressly, that the evidence had been improperly admitted in the first instance, and that it was not to be considered by them in making up their verdict. This was not done, and it is impossible to tell what influence upon their minds the evidence may have had, or that, in fact, it had at all misled them or influenced their verdict, nor is it material to ascertain that fact; it is sufficient that it was illegal and improper, and was calculated to mislead. The motion made by the defendants for a new trial was, therefore, improperly overruled, and the judgment of the Circuit Court is reversed, and the cause remanded for a new trial conformably to this opinion.

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HARRYMAN v. ROBERTSON.

1. The statute requiring affidavit to be made upon lost notes, does not require the words "by accident" to be used. The word "lost" sufficient.
2. In suits before Justices of the Peace, statement of the cause of action not necessary, except in cases for damages on account of wrongs done.

APPEAL from the Circuit Court of Chariton county.

TOMPKINS, J., delivered the opinion of the Court.

Robertson sued Harryman before a Justice of the Peace, and had judgment, from which Harryman appealed to the Circuit Court, where, judgment was again rendered against him, and to reverse it, he appeals to this Court. The summons of the Justice was, to answer William E. Robertson, assignee of William Weir, in an action of assumpsit. To procure the summons, Robertson filed an affidavit, containing these words: William E. Robertson makes oath, that he holds a note, as assignee of Wm. Weir, on James Harryman, &c., which said note is lost, or unintentionally mislaid, as said Robertson believes, and that I have not sold, bartered, transferred or assigned by myself, or any person for me, such instrument of writing. In the Circuit Court, Harryman moved to reverse the judgment of the Justice, because,

First. The affidavit was insufficient.

Second. Because there was no statement of the cause of action filed, and the refusal to give these instructions is assigned for error.

First. The affidavit is in the very words of the statute, and the counsel for Harryman made his argument in the belief, that the statute required the plaintiff to swear that the note was lost *by accident*.

Even had the statute required the party to swear that the note was lost *by accident*, we should have supposed the adjunct, *by accident*, to be useless, and adding no meaning to the word "lost," inasmuch as the word used, as it is, in the statute, implies accident. Objection was also taken to the alternative expression "lost," or *unintentionally* mislaid. What is unintentionally mislaid, is, at least, temporarily lost, (450) but may be regained. The objection seems to be of no weight.

Second. The first section of the act supplementary to the act establishing Justices Courts, and regulating the collection of small debts, provides, that so much of the fifth section of said act as requires that in all suits of debt, or on account, a brief statement of the cause of action and amount claimed, shall be in writing and filed with the Justice, shall be and the same is hereby repealed. See acts of 1826, p. 32.

The words, "all suits for debt, or account," are broad enough, in our opinion, to cover all suits for matters arising on contracts; and this we have several times held to be a rational construction of the act. Suits before Justices for damages, on account of wrongs done, are left as before. In them the statement of the cause of action must still be made. The Circuit Court, in refusing to give those instructions, has not, in our opinion, committed any error. Its judgment is, therefore, affirmed.

HARRIS v. HARMAN.

1. The statute of 1826 dispenses with a statement or declaration required by the act of 1825, except in cases for damages on account of wrongs. See James Harryman v. William E. Robertson, pp. 449-50.
2. In assigned bonds, bills, and promissory notes, that the right of action may accrue against the assignor, due diligence necessary to be shown; or it must be made to appear that the institution of such suit against the maker of the note would have been unavailing.
3. In such actions, it is for the jury to determine whether the plaintiff is to be excused for not having used due diligence.

ON APPEAL from the Cooper Circuit Court.

WASH, J., delivered the opinion of the Court.

Harman, the appellee, sued Harris, the appellant, before a Justice of the Peace, in an action of debt, to recover the amount of a promissory note, assigned by Harris to (451) Harman, and obtained a judgment, from which Harris appealed to the Circuit Court. Whereupon, on a trial *de novo*, Harman again got judgment, to reverse which Harris has appealed to this Court. On the trial in the Circuit Court, Harris moved the Court to instruct the jury, "that they should disregard the evidence offered, and find a verdict for the defendant, as in case of a non-suit; because the plaintiff, at the commencement of his action, had failed to file with the Justice a statement or declaration of his cause of action, &c." This motion was overruled by the Circuit Court and very properly.

The statute of 1826, p. 32, dispenses with a statement or declaration, required by the act of 1825, *Rev. Code*, p. 473, in cases like the present. Harris also pleaded in bar, a former recovery against [by] Harman, in a suit instituted by the plaintiff against the defendant, for the same cause of action. In looking into the record of the first suit, which is set out in the record from the Circuit Court, it is clear that the causes of action were different in the two suits.

The statement or declaration, which accompanied the summons in the first suit, sets out a special assignment and undertaking, entirely different from that which is shown and relied on in the second. The Circuit Court did right, therefore, in overruling the plea. On the second instruction asked for by the defendant below and refused, we think the Circuit Court erred. It is set out in the bill of exceptions, that the defendant gave evidence, conduced to prove that the makers of the note were solvent, and able to pay the same at the date of the assignment to the plaintiff, and had so continued up to the time at which the suit was instituted against the assignor; and also, that the plaintiff gave evidence, conduced to prove that the makers of the note were insolvent, and that a suit against them would have been unavailing, &c. The 2d section of the act concerning assigned bonds, bills and promissory notes, passed Feb. 11th, 1825, *Rev. Code*, p. 143, gives the assignee of a note the right of action against the assignor, in cases only where he shall have used due diligence to

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(452) obtain the money of the maker by the institution and prosecution of a suit, &c.; or where it shall appear to the satisfaction of the Court or jury that the institution of such suit would have been unavailing, &c. In this case, evidence had been given to the jury on both sides, and it was for them to weigh it and determine whether the plaintiff was excused for not having used due diligence by the institution and prosecution of a suit against the makers. In this state of the case, the defendant moved the Court to instruct the jury, that if they believed from the evidence that the plaintiff, Harman, after the assignment of the note to him, could have recovered the debt in the said note specified, of the makers (Galiher and Hungerford) by suit, at any time prior to the time that the plaintiff sued the defendant Harris in the present action, that then they ought to find a verdict for him, the said Harris, &c. The Circuit Court refused to give this instruction, and in this we think it erred; and for this error its judgment must be reversed with costs, and the cause remanded for a new trial.

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1. A part payment of what a person is bound in law to pay, forms no consideration for postponing the residue; neither can the verbal promise of the plaintiff be enforced.
2. A bill of discovery is an equitable proceeding, of which the party wishing to use it must seasonably avail himself; and he cannot be permitted to use it after the cause has been called and the jury sworn, or the cause submitted to the Court sitting as a jury.
3. In cases of particular surprise or hardship, or newly discovered evidence, the remedy is by motion for a new trial, and then a bill of discovery may be proper.
4. An issue is well taken when the substance of the plea is, that a note is void in law by reason of fraud practiced upon the defendant.

ON ERROR from the Howard Circuit Court.

WASH, J., delivered the opinion of the Court.

Cannon, the defendant in error, sued Price, the plaintiff in error, in the Howard Circuit Court, by petition and summons, on a promissory note. Price pleaded,

First. Nil debet.

Second. Payment on the day.

Third. Payment before the day.

Fourth. Payment of ten dollars to Cannon on the 1st day of Oct., 1833, and after the note became due upon the promise of Cannon, that in consideration thereof he

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would wait with the defendant for the remaining part of said sum in the petition mentioned, until the 1st of March, 1834, &c.

Fifth. Payment of ten dollars on the 1st October, 1833, in consideration of which the plaintiff promised to wait with the defendant for the said sum of money in said note mentioned, until the 1st of March, 1834, &c.

Sixth. That the note sued on was given to plaintiff in consideration of a horse sold and delivered to the defendant by plaintiff, who with intent to defraud the defendant, represented the said horse to be sound, &c., whereas he was unsound, and of no value, &c., and that he the said defendant was induced alone by the false and fraudulent representations of the said plaintiff as aforesaid, in relation to the horse as aforesaid, (454) to make and execute the instrument in the said petition mentioned; and the said defendant avers that the said instrument is void in law, &c. Issue was joined on the first, second and third pleas. The fourth and fifth pleas were demurred to, and the demurrs sustained. To the sixth plea the plaintiff replied, that the said instrument in the said petition mentioned, was obtained fairly and honestly by him, the said plaintiff, and not by fraudulent misrepresentations, in manner and form, as the said defendant hath above, in his said plea sixthly above pleaded and alledged, &c., on which issue was taken. The Court sitting as a jury, found the issues for the plaintiff, and gave judgment for the plaintiff on the demurrs and issues so found. To reverse which judgment, the defendant now prosecutes his writ of error in this Court. After the jury had been sworn in the cause, the defendant moved the Court for leave to file a bill of discovery, &c., which was refused. A motion was afterwards made by the defendant, for a new trial, and also in arrest of judgment, which the Court overruled. The judgments of the Circuit Court, in sustaining the plaintiff's demurrs to the fourth and fifth pleas, and in refusing leave to file the bill of discovery, and also in refusing to arrest the judgment on the ground that the issue joined on the sixth plea was an immaterial one, are now assigned for error. The demurrs were rightly sustained to the fourth and fifth pleas.

The whole sum was then due, and the payment by the defendant of a part only of what he was bound in law to pay, formed no consideration for postponing the payment of the residue, and the verbal promise of the plaintiff, if made, could not be enforced. The bill of discovery ought not to have been allowed. The evidence sought to be discovered could not have availed the defendant upon the issues in the cause. Besides, the application came too late.

It is an equitable proceeding, of which the party must avail himself seasonably. After the cause had been called, and the jury sworn, or the cause submitted to the Court sitting as such, the bill ought not to have been entertained.

(455) In cases of particular surprise or hardship, or newly discovered evidence, &c., the remedy is by motion for a new trial, and then a bill of discovery might be proper, but this is nothing like such a case.

On the third point we felt some difficulty at first, but in looking into the books we think the issue was well taken on the sixth plea.

The substance of the plea is, that the note is void in law, by reason of the **fraud** practiced by the plaintiff in obtaining it from defendant, &c., and this is the matter traversed. The forms in *Chitty* of a plea of fraud in obtaining a deed, &c., and the replication thereto, seem to have been taken as the pleader's guide in this case. Certain it is, none better are to be formed in most cases. Upon the whole matter, therefore, the judgment of the Circuit Court is affirmed, with costs.

HACKNEY v. WILLIAMS.

An insufficient affidavit made for a writ of attachment before a Justice of the Peace may be amended in the Circuit Court upon application to file a legal and sufficient one.

APPEAL from the Monroe Circuit Court.

WASH, J., delivered the opinion of the Court.

Hackney sued out an attachment before a Justice of the Peace, against the property of one Roberts, and had Williams summoned as garnishee; on the return day of the summons, Roberts, the defendant in the attachment, failed to appear. Williams, the garnishee, appeared and answered.

On the day of trial, Roberts again failed to appear, and judgment was rendered against him, and it appearing from the answer of Williams, that he was indebted to Roberts in a larger sum than the amount of the judgment obtained by Hackney, judgment was also given by the Justice against Williams the garnishee, for the (\$56) amount recovered against Roberts. From this judgment, Williams appealed to the Circuit Court, where the judgment of the Justice was reversed, and the cause dismissed for want of a good and sufficient affidavit, on which the attachment was sued out against Roberts. From this judgment of the Circuit Court, reversing the judgment of the Justice, and dismissing the case, Hackney appealed; and now seeks to have the same reversed in this Court. When the motion was made in the Circuit Court to reverse the judgment of the Justice, and to dismiss the cause for want of a sufficient affidavit, to authorize the proceedings by attachment before the Justice, the attorney for Hackney tendered an affidavit in due form, and the only question that need be now considered is, whether, under the provisions of an act of the General Assembly, passed on the 17th February, 1831, entitled "An Act supplementary to an act to provide a method of proceeding against absent and absconding debtors, approved February 6th, 1825.

The Circuit Court ought to have allowed the plaintiff to amend the defect of the original affidavit, by filing the one which was tendered in due form, &c. The first section of the act above referred to provides, that no writ of attachment hereafter to be issued, either by a Circuit Court or a Justice of the Peace, shall be dissolved, nor the property taken thereon be restored, &c., on account of any insufficiency of the original affidavit, if the plaintiff, or some credible person for him, shall file a legal and sufficient affidavit in such time and manner as the Courts or Justices respectively shall in their discretion direct, and in that event the cause shall proceed as if the original affidavit had been sufficient; under this provision of the law, it is contended by the appellee's counsel, that the new or amended affidavit provided for can be taken only by the Justice, or the Court before whom or in which the proceeding was instituted. We think, however, that the expression in the statute, "if the plaintiff, or some credible person for him, shall file a legal and sufficient affidavit in such time and manner as the Courts or Justices respectively shall in their discretion direct," is

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(457) not to be construed as limiting the power of permitting the amendment to the Justice or Court before whom or in which the error was committed; but as giving it to either, before whom the objection may be raised, and to whom the application to amend may be made. No reason can be perceived why the power should not be exercised by the Circuit Court in a case commenced before a Justice of the Peace, as well as in any other. In furtherance of the views of the Legislature, the act should be liberally construed, and we think the Circuit Court erred in refusing the plaintiff leave to file the affidavit of Alexander Gibony, in lieu of the original affidavit of Hackney, which was defective, and in reversing the judgment of the Justice, and dismissing the cause. Its judgment must, therefore, be reversed, and this cause remanded, with directions to that Court to reinstate the same and proceed to a new trial conformably to this opinion.

YANTIS v. BURDETT.

1. A plea setting forth that an action on a judgment was commenced while the plaintiff, on the same judgment, was endeavoring to raise money by execution, would be good.
2. A Court of Equity will not allow a defendant to open a judgment at law, to prove a payment which he had been too negligent to prove on the trial at law.
3. A Court of Chancery will, under no circumstances, allow a judgment at law to be stayed for very paltry sums, unless in cases of the grossest fraud.

APPEAL from the Chancery side of the Circuit Court of Lafayette county.

TOMPKINS J., delivered the opinion of the Court.

On the 7th of August, 1832, Yantis filed his bill against Burdett, stating that on the 11th May, 1829, he, together with Benjamin F. Yantis and Joseph P. Letcher, executed their promissory note to said Burdett, the defendant, payable on the 11th (458) November then next, for the sum of one thousand dollars; that sometime thereafter, said Burdett commenced suit against the complainant in the Circuit Court of Garrard county, in the State of Kentucky; and that, at the September term of the said Court for the year 1831, judgment was rendered in said suit for the sum due and interest at the rate of six per cent. per year till paid, subject however to a deduction for interest paid till the first day of July, 1831; and that said Burdett then instituted a suit against the complainant in the Circuit Court of Lafayette county, in this State, on the judgment so rendered in Kentucky; and at the June term thereof, for the year 1832, had judgment against the complainant for the sum of one thousand

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dollars debt and fifty-five dollars thirty-eight and a half cents damages. The complainant then alledged that, on or about the first day of July, 1831, Benjamin F. Yantis, one of the makers of the promissory note aforesaid, paid the defendant one hundred dollars, for which no credit was given; and that Burdett, the defendant, caused to be taken on execution in the State of Kentucky, property in the possession of the complainant, to satisfy the judgment aforesaid, to the amount of about seven hundred and thirty dollars, which property was claimed by one John Buford, who, in compliance with the laws of Kentucky, gave the Sheriff, for the use of said Burdett, his bond for the payment of that sum of money, to be paid in the event the property levied on should be found to belong to the complainant; that it was yet unknown to the complainant to whom that property was decided to belong; and that the defendant is now proceeding under the law of Kentucky to make the money, for which the judgment was there obtained as aforesaid; and has actually sold property of the complainant to the amount of fifty dollars, for which no credit is given, and prays an injunction, &c. Burdett, answering, admits the origin of the debt, judgment and proceedings under it in Kentucky, but says that the property levied on was valued at only four hundred and ninety-five dollars; and that he has not yet made any thing from the property so levied on; he admits that the complainant is entitled to a credit of \$10 39, the amount of money by him received for property of the complainant sold in Kentucky, to satisfy said judgment. He admits, also, the payment of one hundred dollars, but says that it was applied to the payment of the interest, accrued before the judgment in Kentucky. The Circuit Court decreed for the complainant, and made the injunction perpetual as to five hundred and five dollars and thirty-nine cents. On the part of the complainant it is contended that this is a case of exclusive Chancery jurisdiction. He admits that if property to the full amount of the execution had been levied on, such levy might have been pleaded in bar; and that this Court did, in the case of Bailey against Gentry and wife, decide that it was error to allow a second execution to issue before the return of the first, showing that the judgment was not satisfied; yet it is contended that no case can be found in which a levy of part of the amount of the judgment, can be pleaded in bar to an action on that judgment. This may be true; the defendant in this bill has produced before this Court no such case. It may be that none before him was ever bold enough to sue on a judgment, while he was attempting to raise by execution the money to satisfy such judgment.

But if a Court of Law would refuse a second execution, before the return of the first not satisfied, can it be presumed that the same Court would entertain an action on a judgment while the plaintiff was endeavoring to raise money by execution, to satisfy the same judgment? It seems plain, that a plea setting forth that matter would be a good defence. The bill does not disclose the state of the pleadings in the suit at law; and for any thing disclosed in it, that matter may have been in issue and found against the complainant. It is not pretended that the complainant was ignorant of the payment of the sums of money admitted by the defendant's answer. Two judgments, it appears from his own statement in the bill, to have been had against him since the payment of the sum of one hundred dollars by Benjamin F. Yantis, on or about the first day of July, 1831; and one, we may presume, since the payment of the sum of ten dollars and thirty-nine cents, admitted by the defendant. (460) A Court of Equity would be a very mischievous thing, if it were to open a judgment at law, to allow a defendant to prove a payment, which he had been too

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negligent to prove on the trial at law. For no fraud or concealment appears on the part of the defendant to require the interposition of a Court of Equity. But if we look behind these two judgments at law, in both of which the complainant has neglected to prove the payment of the one hundred dollars paid by B. F. Yantis, we find that the interest on one thousand dollars, from 11th November, 1829, when the note became due, till 11th July, 1831, is precisely one hundred dollars. The judgment rendered against him in Kentucky is for the principal sum and interest till paid, subject to a credit of interest till first July, 1831; so that, if this Court were to aid him, he would be relieved of the payment of one dollar and eighty-two cents only of that sum, and the sum of ten dollars thirty-nine cents, which the complainant admits he is entitled to, but which, for any thing here shown, the complainant might have obtained an allowance for before the Circuit Court in this State, had he used ordinary diligence. It may be here observed that the complainant has not ventured to call the property levied on in Kentucky his own.

Under no circumstances, perhaps, would a Court of Chancery stay a judgment at law for the paltry sums of one dollar eighty-two cents, and ten dollars thirty-nine cents, unless in cases of the grossest fraud. But here there is no evidence of fraud on the part of the defendant, but of the most gross negligence on the part of the complainant. The decree of the Circuit Court ought therefore, in the opinion of this Court, to be reversed, the injunction dissolved, and the complainant's bill dismissed, and it is so ordered to be done.

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P. W. & J. PRICE *v.* HALSED.

1. A writing signed by a party praying an appeal from a Justice of the Peace, is not an affidavit within the meaning of the statute, until certified by the Justice.
2. It is the duty of Justices of the Peace to keep a docket, in which he shall keep fair and accurate entries of all suits instituted before him with the proceedings thereon; and if a Justice of the Peace has failed to certify to a paper intended as an affidavit, it is error in the Circuit Court to permit him to come into Court and there certify to the same.
3. The appellant in a recognizance is bound to make it to the appellee, and not "to the State of Missouri." A recognizance so taken is considered not merely informal, but substantially defective.

ERROR to the Circuit Court of Chariton county.

TOMPKINS, J., delivered the opinion of the Court.

Halsed brought his action against the plaintiffs in error, before a Justice of the Peace; and judgment being there given against him, he appealed to the Circuit Court,

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where he had judgment against the plaintiffs in error, and they bring the cause into this Court to reverse the judgment of the Circuit Court Justice.

It appears from the record that the plaintiffs in error moved the Circuit Court to dismiss the appeal from the Justice, for these two reasons:

First. There was no affidavit, as required by law.

Second. There was no recognizance.

There was among the papers sent up by the Justice of the Peace, a paper subscribed by Halsed, the appellant, on which were written the words, "necessary to make an affidavit;" but the Justice of the Peace had not certified that the appellant had sworn to it. There was also among the same papers a writing signed by Joseph Halsed and John Lewellyn, by which they acknowledged that they owed to the State of Missouri a certain sum of money, to be levied of their respective goods, and chattels, &c., conditioned that said Halsed shall personally appear at the next Circuit Court, &c. The act of 18th January, 1831, concerning Justices' Courts, provides that before an appeal from the judgment of the Justice of the Peace to the Circuit (462) Court is granted by the Justice, the person, or his or her agent praying said appeal, shall file an affidavit, to be subscribed by the person making the same, that the application for the appeal is not for the purpose of vexation and delay; but because, &c. See sec. 2d, p. 33. The act of 21st February, 1825, concerning Justices' Courts, requires the party appealing from the decision of the Justice of the Peace, to enter into a recognizance with one or more sufficient securities, to secure the debt, &c. The recognizance is required to be, as near as may be, in the following form, to wit: We the undersigned —— acknowledge ourselves to be indebted —— (the appellee) in the sum of, &c. The Circuit Court permitted the appellant to call in the Justice before whom the cause was tried, to certify the above mentioned writing signed by Halsed; and which was intended for an affidavit, the Justice having first sworn that Halsed had filed that paper, and sworn to the truth of the statements thereon made, before the appeal was granted, was permitted to certify it. The appellant's counsel insist, that their client is not to suffer by the neglect of the Justice to sign the paper above mentioned, and rely on the 3d section of the act of 18th January, 1831, above cited. That section is in these words: "When an appeal shall be taken from the judgment of the Justice of the Peace to the Circuit Court, no objection to the proceedings of such Justice shall be valid, but the Circuit Court shall proceed to try the cause upon its merits." The preceding section as before mentioned, positively forbids the Justice to allow an appeal before affidavit filed.

And, it is certain, that the writing in question was not an affidavit till it was certified by the Justice. The question then comes up, had the Circuit Court the authority to require the Justice to certify?

The law requires the Justice to keep a docket, in which he shall make fair and accurate entries of all suits and actions instituted before him, with his proceedings thereon. See *Digest*, p. 475. It was the duty of the Justice, on the day of trial, to enter on his docket the affidavit filed on that day. If such were the case, if he had (463) neglected to make such entry at the proper time, his right to make it at a future day would not be denied, though it would be a very careless act; and from his docket he might amend the transcript, and then venture to certify the writing intended as an affidavit. This amendment might be so made in the Circuit Court by consent; or the appellant might, on a suggestion of a diminution of record, have moved for a certiorari, to bring up the record as amended. If the Justice's entry,

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made at a subsequent day, were true, all would be well; if not, then the appellee knows how to seek redress for the injury done to him. To suppose that the third section before referred to, would authorize the Circuit Court to amend as it has done, would be to suppose that the second section was repealed by the third, and that the Legislature meant to sacrifice the interest of the appellee to those of the appellant. The docket of the Justice is, so far as his decisions are concerned, record evidence; and if trusting to his honesty and memory only, the Circuit Court is to decide whether an appeal has been taken, the rights of parties litigant will be very insecure. In permitting the Justice to come into Court to certify an affidavit, which he should have certified on the day the appeal was taken, we think there was error. By the 21st section of the act establishing Justices' Courts, it is provided that if the recognizance on appeal shall be set aside by the Circuit Court for any informality or insufficiency for the same, the appellant may execute another, &c. The form is there given, and the appellant is required to make the recognizance to the appellee; such as it is, it is made to the State of Missouri. If this be nothing more than an informality, then there is no such thing as a substantial defect. The Circuit Court then, we think, erred in permitting a recognizance to be executed. For these errors its judgment is reversed, and the cause remanded.

Decisions of the Supreme Court of Missouri.

BOWLING GREEN DISTRICT, AUGUST TERM, 1834.

SINGLETON, TO THE USE OF GIBBS, v. MANN, ADMINISTRATOR OF ALLEN.

1. The possession of a bond is, *prima facie*, evidence of a right in the possessor to receive the money from the obligor, if he choose to pay it; and it also gives him the power to sue for the money in the name and to the use of the obligee.
2. A new trial ought not to be granted, where the testimony is equal in the Circuit Court. And when the testimony is stronger against a verdict than it is for it, still that affords no reason for the interference of the Supreme Court, unless it should strongly preponderate.
3. An administrator, by statute, is made a competent witness with regard to all facts which occurred before his administration commenced.
4. A man may make his wife his agent.
5. That the acts of the agent bind the principal, though some should be to his advantage and some not so; and whatever the agent says or does, in relation to the act by him to be performed, is a part of the *res gesta*, if done or said while the transaction is passing; and proof of agency may be made by matter *ex post facto*.

APPEAL from the Circuit Court of Marion county.

M'GIRK, C. J., delivered the opinion of the Court.*

An action of debt was brought by Singleton to the use of Gibbs, against the administrator of Allen. The defendant pleaded payment; a verdict and judgment were given against him, and he appealed to this Court. On the trial, the plaintiff gave in evidence his bond, and there closed his testimony; the defendant then moved the Court to instruct the jury, that unless the plaintiff had proved to them by other

*Wash, Judge, absent from indisposition.

Singleton v. Mann.

(465) evidence than the mere possession and production of the bond, that Gibbs was the owner of the bond, the plaintiff could not recover, which was refused.

The question raised is a narrow one. It is argued that Gibbs is the real owner of the bond, and the real plaintiff, and as he claims to have the right to the money he must show his claim is true. In this case Gibbs was the possessor of the bond.

That possession, *prima facie*, gave him a right to receive the money from the obligor, if he chose to pay it. This possession also gave him the power to sue for the money in the name of the obligee, and to prosecute and defend such suit; all the defendant has a right to demand, is that the suit and recovery should be such that he might plead it in bar to a future action. In this case, the suit is in the name of the obligee; a recovery in his name would undoubtedly protect him against a future recovery on the same note, for the suit would be brought in the name of an assignee, or the obligee.

It is not for the defendant to object, that the obligee has seen fit to put this note into the hands of another and permit him to sue for the money to his use; he has nothing to do with that. The possession of the note is evidence enough of the fact that Gibbs has a right to control the suit and receive the money.

The defendant then entered on his defence: he offered a receipt in evidence, which went to show payment of the whole note, made by the wife of the administrator before her marriage with him; which payment purported to be made to one Hamilton, of whom Gibbs purchased the note, and before Gibbs became the owner. The evidence with regard to this receipt was, that on the 21st day of March, 1831, one Mitchell was called on by Hamilton to make out an invoice of goods of Hamilton to be sold to Singleton, and that the note sued on was to be taken as part payment for the goods; he did so, and the witness thinks on the 24th the invoice was completed, the goods delivered, and the note handed over to Hamilton, and that Hamilton left the country on the 27th with a drove of horses. The receipt bore date the (466) 19th of March. The defendant introduced a witness who swore that he had frequently seen Hamilton write, and that he believed the signature to the receipt was his. Other witnesses were introduced on both sides, about equal in number, to prove and disprove the hand writing to the receipt; among others, the administrator Mann was introduced without objection, who swore, that before his intermarriage with Pamelia Allen, and before he took out letters of administration, he was called on by the said Pamelia to write a receipt for her, which he did, and he wrote the one offered in evidence; that Hamilton was then at the house of the widow Allen, and told her to prepare the receipt and he would sign it; that Hamilton and Pamelia had a long settlement of the debts of Hamilton to the estate of her deceased husband. Hamilton said he would return in a few days, and sign the receipt when she had prepared it; that Hamilton did return in two or three days after the receipt was written, and asked if the receipt was written and ready; that Hamilton and Pamelia went into the dining-room; that Pamelia came into the bar-room where witness was then attending to some persons; that she took out an ink-stand, borrowed some money from him, and re-entered the room. In a short time the parties came out, and Hamilton observed that they had settled, and that he had signed the receipt against the bond. Witness also says, the receipt was dated on the day it was written, and that from his knowledge of the hand writing of Hamilton, having frequently seen him write, he believed the signature to be his. He did not see Hamilton sign the receipt, his attention being called to the guests who entered into the room. Witness was at

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this time a bar-keeper to Pamelia Allen, the widow of Samuel Allen, the maker of the bond. It was also proved that at this time, Pamelia, the widow, was the sole devisee of Samuel Allen, deceased.

One Turgell swore that he heard Singleton say, that he took Hamilton to Mrs. Allen before the bond became due, and told her that he had transferred the bond to Hamilton, and that she was authorized to pay the money to him; when this was done, the witness does not say. This man's testimony was impeached by a witness, (467) who swore that some of the neighbors thought him a bad man, and others did not.

One Crocker swore, that in December, 1831, or January, 1832, the widow showed him the receipt in question, but folded the date and signature under. He told her, in reference to some remarks she made about proof of the signature, that if that was true, there would be no difficulty about proving the hand writing of Hamilton. That he afterwards saw the receipt and took it to the light, and saw in a minute the signature was not Hamilton's. It was also proved, that some of the witnesses on the part of the plaintiff, were hostile to the defendant and wife. The plaintiff then proved by one Whaley, that on the 26th of March, 1831, Hamilton sold the bond to Gibbs; that before this sale he went to Mrs. Allen, and she told him not to buy this bond, if he did not want a law suit; that the bond was given by her husband, Allen, for a lot, and that part of the houses were on the wrong lot; and that he does not recollect that she assigned any other reason why he should not buy the bond. The defendant objected to the introduction of these declarations of Pamelia Allen; the Court permitted the testimony to go to the jury.

Mann, the plaintiff in error, assigns for error, first, that the Court erred in refusing him a new trial. On this point we see no reason why the judgment should be reversed; there was testimony on both sides, the evidence against the validity of the receipt was the strongest. It seems to us, the rule by which we ought to be governed is this: where the testimony is equal in the Circuit Court, then no new trial ought to be granted.

When we see the testimony is stronger against the verdict than it is for it, still that is not any reason why we should interfere. It should strongly preponderate: so far from that being true, we think the evidence strongly preponderates in favor of the verdict. The next question is, did the Court err in admitting the declarations of Mrs. Mann, the wife of the administrator, to be given in evidence?

It is true, as argued by the counsel for Mann, that the declarations of a wife cannot (468) not be given in evidence for nor against the husband, where he is plaintiff or defendant.

By the statute of this State, *Rev. Code*, c. 102, the administrator is expressly made competent with regard to all facts which occurred before his administration commenced. This question, however, is not the one raised by the record. It is argued that the present wife of the administrator, is to be viewed in the light of an agent. On the other side, it is insisted when the declarations were made, she was not the agent for the administrator; for then no administration existed. This latter fact is true, but that will not alter the case.

To understand this point correctly, the following points may be laid down as indisputable law:

First. That every person, in general, may make an agent to do that for him, which was inconvenient for him to do himself.

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Second. A man may make his wife his agent.

Third. That whatever the agent does and says, in relation to the act by him to be performed, is a part of the *res gesta*, if done or said while the transaction is passing.

Fourth. That the acts of the agent bind the principal, though some should be to his advantage, and some not so.

Fifth. That the proof of agency may be by matter *ex post facto*. To this point see 2 *Starkie* 57-8. Let us test this case by these rules. In this case, the wife, when she made the declarations given in evidence, was the sole devisee of Allen, the husband. It was her interest to resist all claims not well founded. The defendant now sets up a payment, which the wife made, as a discharge to a bond made by the intestate; he claims this payment as a good one; for the purpose of the payment, he chooses to consider her as the agent, but when the question is raised, whether, in fact, this payment was or was not made; whether the receipt is a forgery or not, he objects that as to her declarations and conduct, while the thing was transacting, she is not to be considered as agent.

The declarations of a wife made at the time of effecting a policy of insurance on (469) her life, as to the state of her health, are considered as facts, and may be given in evidence. 2 *Starkie* 713. Declarations of the wife, as agent of the husband, are admissible just as those of any other agent are: 2 *Starkie* 713, 10 *John. R.* 88. The case in *Johnson* was a case where the husband and wife separated by articles. The husband covenanted with a trustee to deliver to the wife a carriage and horses; and on a suit between the husband and trustee, the wife's declarations that she had received the carriage and horses, were admitted on the ground that as to that matter, the wife as the agent to receive, of course was competent to acknowledge the fact. In this case, a strong contest exists about the fact, whether or not the receipt was forged. The present wife made herself an actress in the transaction. The defendant now sets up the act to his benefit, he thereby makes her the agent by recognition, after the act is done. It would be contrary to every rule of justice to let him select those things which go to his benefit, and reject all that is against him. The declarations were important to show the receipt was a forgery. Mann's evidence pretends, that on the 19th day of March, the receipt was written; that in two or three days it was signed and the money paid; that would make the payment on the 23d. The proof is clear that Hamilton did not get the note till the 24th. After this, the widow was found advising a witness not to buy the note, because the consideration had failed; if this be true, it raised a strong presumption that Mann's testimony about the receipt is false. In this point of view the declarations of the wife were relevant and important, and we see no objections to their competency.

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STARK v. MILLER, GRAHAM AND WASH.

1. A lessor and lessee do not stand to each other in the relation of principal and agent; and where an injury is done to the legal rights of the lessee, the lessee and not the lessor, must sue.
2. A ferry is not an incident to the land, but arises out of the license of the County Court.

WRIT OF ERROR to the Circuit Court of Pike county.

WASH, J., not sitting.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of trespass, *quare clausum fregit*. There are several counts in the declaration, some of which alledge, that the defendant trespassed on the land, and that he disturbed the plaintiffs in the enjoyment of a ferry they had on the Mississippi river, at and adjoining to said land.

The plaintiffs gave evidence of the trespass on the land. They gave evidence of a contract between them and other persons, whereby they leased a ferry to Smith and Owsley, adjoining and at the land for two years; the lessees were to find their own boats and hands, and were to procure a license from time to time from the County Court in their own name to ferry, &c. The lessees were to pay \$45 for the lease, and the lessors covenanted to keep and maintain the lessees in peaceable possession, &c.

The plaintiffs offered evidence to show that the lessees had boats, hands, &c., and did exercise the rights of ferrymen; took pay, &c., and had a license. It was also proved that the defendant greatly disturbed the lessees in the enjoyment of their rights as ferrymen. The defendant objected to the introduction of this testimony. The Court let the testimony go to the jury, with an explanation that the acts of the lessees were the acts of the plaintiffs. The introduction of this evidence was wrong.

The law is, that the acts of an agent are the acts of the principal; but in this case (471) the lessees are not agents of the plaintiffs; whatever injury was done by Stark to the ferry rights, were done to the legal rights of the lessees, for which the plaintiffs have no right to sue.

It is insisted that the injury done to lessees, is an injury to the reversion of the plaintiffs.

This cannot be so: a ferry in this country is not incident to the land, but arises out of the license of the County Court. The plaintiffs, in fact and law, had no ferry; they had the land on the margin of the river. This land they could lease for the purpose of being used for a boat or ferry landing; and this is all they could do, unless they had a license to keep a ferry at that place; if they had, then they might lease or sell that privilege.

It is said the Court cured the error of admitting this evidence, by afterwards instructing the jury, that if they found the lessees had a ferry, then the plaintiffs could not recover; this instruction did not cure the error, for when the testimony was admitted

Crocker v. Mann.

the Court laid the law down to be, that in this particular case, the lessees were the agents; assuming it to be the law, that afterwards if it were proved they were not the agents, then the injury done to them would be injuries to their individual rights, and for such injuries the present plaintiffs could not recover. The evidence ought to have been rejected. The judgment is remanded for further trial.

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CROCKER v. MANN.

1. The action of replevin will lie in all cases where trespass will lie, and is not a local action in those cases where the object of the replevin is to try the mere right to property, without reference to place.
2. The right of distress of beasts, for breaking fences, does not exist in this State, a remedy for such cases being expressly given by our statute, by suit before a Justice of the Peace.
3. The right of distress for rent does not exist in this State—it is a common law right, and may be regarded as obsolete. By our statute, an action of debt for rent may be maintained on leases for life.
4. In an action of replevin, all that is required to be done, according to our statute, is that the plaintiff be actually possessed of the property in question, or have the right to immediate possession; that the same was found in the hands of another, and that he must account for such possession. (Note a.)
5. The rule in striking out of a declaration that which is surplusage, is, that when the objectionable part is stricken out, if there be not enough left, then it cannot be stricken out.
6. Where a plaintiff, upon an inspection of the record, cannot amend the defects apparent against him, the judgment of the Court below must stand; but if he can, on a future trial, consistently with law, make his case better, the judgment of the Court below will be reversed.

APPEAL from the Circuit Court of Marion county.

M'GIRK, C. J., delivered the opinion of the Court.

Crocker brought an action of replevin against Mann for taking a negro. The declaration states, that on a certain day the plaintiff was possessed of the slave in the county of Marion, and that afterwards, on that day, in the county of Marion, (on the public highway leading from Palmyra to Hannibal, about five miles from Palmyra,) the defendant Mann, took the said slave and unjustly detains the same. The defendant pleaded *non ceperit*, and *property in himself, &c.*

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The evidence on the part of the plaintiff was, that he purchased the slave at a Constable's sale, on execution, and judgment of some person against Mann; that the property was levied on as Mann's property, and that the plaintiff was the purchaser, &c. To the admission of this evidence, the defendant objected, but the Court let the testimony go. The plaintiff proved the delivery of the property to him by the Con-(473) stable; he then proved that afterwards, Mann was found in possession of the property, in the county of Marion; and that the Sheriff took it from him by the writ of replevin. No proof was given as to the manner of Mann's getting possession; no proof was given to show that Mann's possession commenced on the highway leading from Palmyra to Hannibal, &c. On this state of the testimony, the defendant asked the Court to instruct the jury, that if they believe from the evidence the defendant did not unlawfully take the slave from the plaintiff, at the place in the declaration mentioned and described, they must find for the defendant; which instruction the Court gave; then a verdict and judgment were given for the defendant. The giving this instruction is assigned for error.

The question made by U. Wright and Hunt, the counsel for Mann, is, that the action of replevin is local, and that the plaintiff having failed to prove the taking at the place, that is, on the highway leading from Hannibal, &c., cannot recover.

J. Anderson, counsel for the plaintiff, insists that the action is transitory.

We will examine this question; there can be no sort of doubt that the action of replevin is local in England. Many books and authorities will prove this. It has often been decided also in N. Y. that it is so. In England, the action was almost exclusively confined to cases of wrongful distress, for rent or damage feasant. The instances of its application to other cases were so rare, that Sir Wm. Blackstone laid it down as the law in the third volume of his justly celebrated commentaries, that it would not lie in other cases.

Farther research has shown, however, that Blackstone was mistaken in this; and that the action might be maintained in all cases where trespass would lie. When cattle broke into a man's close, the owner of the close might seize and keep the cattle till satisfaction was made. When this remedy for breaking fences is allowed, it must (474) often happen that the owner would either take too much distress, or misuse it afterwards; refuse to deliver the distress when satisfaction is offered, or think enough had not been offered. In such case the owner brought replevin. The defendant must show he had a close, and where it was, and that the beasts broke in, &c. In this way, the identical field and lot where the cattle were taken, became material. When the owner of lands and tenements leased the same to tenants who did not pay the rent, the law gave the landlord a right to go to the land, and into the houses, and take as much property as would be sufficient to pay the rent in arrear, and he might sell the distress if the rent were not paid. If in these cases no rent were due, the distress excessive, or if the property of a stranger happen to be found on the land, and was distrained, the action of replevin would lie; or if the landlord took the property of the tenant at any other place than on the leased premises, the action would lie. In this way, there was a necessity that at least in all the cases arising out of distress for rent, the action should be local; because if the distress were made at any other place than on the premises where and for which rent was due, it would be void, hence the necessity of laying in the declaration, the place with certainty; but in all those cases where the object of the replevin was to try the mere right to property, without any reference to place, there could be no more reason why the exact place

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should be any more material than it could be where a trespass was committed in actions of trespass; nor more material than it would be where any other injury might be committed; but as the action of replevin was mainly used in cases of distress, where the place was material, it is not too much to say, that the action itself became settled in the English law to be local.

In Missouri, there is no such thing heard of as distress of beasts for breaking fences, and indeed this right does not exist. Because, by the 2d section of the act of the General Assembly to regulate inclosures, a remedy is expressly given by suit before a Justice of the Peace, *R. C.* 438. This remedy existed at the time the common (475) law was introduced, which expressly excludes all those portions of the common law contrary to the statute law, *R. C.* 491. Distress for fence breaking and the remedy given by statute, are perhaps inconsistent; at any rate, the statute remedy supercedes the other, with regard to the right of distress for rent, it never has been used in this country; it is a common law right; but from the circumstance that since the American government overspread this country until the present day, it never has been used, at least we never heard of a case, except one, we think that remedy may fairly be supposed to be obsolete. We have a statute giving an action of debt for rent, on leases for life. The 2d section of that act gives an action of assumpsit in all cases where the agreement for rent is not by deed, *R. C.* 488; now in all cases, the agreement is by deed or not. This remedy is, perhaps, all the remedy the country required, and was deemed so by the Legislature in 1825, when the act was passed. That this was thought sufficient, is somewhat deducible from the fact, that before that time, distress had not been resorted to; this, then, could not be accumulation. The statute which introduces the common law, excludes all such portions as are repugnant to, or inconsistent with the statutes of the State for the time being. Now, perhaps, it may be literally true, that this act respecting rent is not repugnant to or inconsistent with the common law; yet the fact that the Legislature have taken up the subject, and covered the whole ground, is in our opinion a good reason why the common law should be considered superseded; and the bare fact, that the remedy of distress for rent has never been used, is perhaps a good reason why it should be considered obsolete. From this it follows, that there is no necessity for the action of replevin to be local; when the reason of a law ceases, the law also ceases; this is a good rule of common law, which applies in this case. Furthermore, we can see no reason why an action of replevin, with us, should be local as used in this State. It being a useful action, it should not be subject to that incumbrance, until a case arises in which the reason exists; then the local quality for the purposes of justice should be attached. An-(476) other reason why we think the action is not local is, that the Legislature manifested a strong intention it should not be so. By the act to regulate replevin, *R. C.* 659, they say "that in all cases, where any goods or chattels shall be taken from the possession of any person lawfully possessed thereof, without his or her consent, it shall be lawful for such person to bring an action of replevin therefor against any person in whose hands the same may be found." This statute was intended to put the action of replevin on a useful footing.

All that is necessary to be done to comply with this statute is, to show the plaintiff possessed the property actually, or had the right to immediate possession, and that the same was found in the hands of another, that other must account for such possession. If this be what the statute requires, why should the locality of the old

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common law, useful in England in some cases, be thrown around a remedy so useful as replevin? But it is said that if this action is not local, yet the plaintiff has made it so by alledging the taking to be at a particular place, he must prove it; to avoid this conclusion, the counsel for the plaintiff relies on the rule of law which says, surplusage may be stricken out; we think this rule can justly apply in this case. The plaintiff first says, the defendant took the property from him in the county of Marion, (on the highway leading from Palmyra to Hannibal, about five miles from Palmyra). If we strike out all within the brackets, then there is no objection to the declaration. It will then read that the taking was in the county of Marion.

The rule as to striking out is, that if when the objectionable part is stricken out, there is not enough left, then it cannot be stricken out. In this case, that laid within the brackets is entirely surplusage; and when stricken out, leaves a good declaration. We are of opinion the Circuit Court erred in giving the instruction it did give.

But it is said that the law is, that although the Court erred in giving the judgment it did give, yet if upon an inspection of the whole record, the Court can see that the plaintiff could not lawfully recover, the Court will let the judgment stand. This is (477) the law and practice of this Court, with this modification.

That if we see the plaintiff cannot amend the defects now apparent against him, the judgment must stand; but if he can on a future trial, consistently with law, make his case better, we will reverse the judgment and let him make the experiment.

In this case we see no reason why he cannot make his case better; he may, consistently with the nature of the thing, if the fact will justify it, and that we cannot now determine; he may amend all the defects alledged against him, even the objection made to the return of the Constable in the original summons, may, by leave of the Justice, be amended so as to correspond with the truth. The only objection to this is, that the return does not show whether the copy which was left at the defendant's house, was left with a member of his family or not; the truth is one way or the other. Upon this point one of the Judges is not very clear. The judgment is reversed, remanded, &c.

(a.) See Skinner v. Stouse, 4 Mo. R., p. 95.

BUFORD v. CALDWELL.

1. To charge that a representation was falsely and fraudulently made, is a substantial charge that the defendant knew it to be untrue; and where it may be reasonably inferred that the party making the representations must know the truth of the matter, of which he speaks, to state what is not known to be true, is just as criminal in the eye of the law as to state what is known to be false.
2. Neither law nor equity will afford relief where the subject matter of dispute is equally known to both parties, or about which both parties had equal means of information, and in regard to which they are equally negligent.

WRIT OF ERROR to the Circuit Court of Ralls county.

WASH, J., delivered the opinion of the Court.

This was an action on the case brought by Buford *v.* Caldwell in the Circuit Court, (178) to recover damages for certain misrepresentations made by the defendant to the plaintiff, in the sale of a tract of land. The defendant demurred to the plaintiff's declaration, and had judgment; to reverse which Buford has come with his writ of error into this Court.

The declaration charges "that in a conversation made and had concerning the sale of the tract of land, the defendant showed to the plaintiff a certain dwelling house, and other buildings, and certain improved lands, amounting to about eighty acres, and represented to the plaintiff that the same were situate upon and within the boundaries of said tract of land;" "that, by the representations so made, he was induced to make the purchase of the defendant; that said representations were false and fraudulent; and that the said dwelling house and eighty acres of improved land so shown and represented to be within the true boundary of the tract, are without the boundary of the tract so sold by the defendant to the plaintiff, and upon lands belonging to the Government of the United States," &c., &c. For the defendant two points have been raised.

First. It is insisted that the plaintiff's declaration is defective, in not charging that the representations were made falsely and fraudulently by the defendant, knowing them to be untrue.

Second. That an innocent misrepresentation, or one founded in ignorance or mistake, is no ground for relief at law or in equity.

In support of these positions the counsel for the defendant have cited 1 *Chit. Pl.* 133 and 376; *Tucker's Notes on Blackstone*, vol. 3, p. 154; 2 *Starkie Ev.* 467, 469, 471, and 472; *B. N. P.* 31 and 4; *Taunt.* 779.

For the plaintiff in error it is contended,

First. That the *scienter* need not be alledged in a case like the present, and if alledged, need not be proved.

Second. That it has been sufficiently alledged in charging the representations to have been made falsely and fraudulently.

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In support of the first position taken by the plaintiff's counsel, they have cited (479) *Saund. on Ev.*, 2 vol. p. 28; *Dougl.* 91; 4 *Camp.* 22; 2 *East.* 446; 4 *Bing.* 66; and 1 *Marsh.* 192 and 496.

On the second point they have cited 2 *Saund. Ev.* 527; *Willes*, 584; and *Rer. Code*, 626. There are some conflicting authorities cited by counsel on both sides, as to the cases in which a *scienter* must be averred, which we shall not attempt now to weigh or to reconcile; the declaration in this case, though carelessly and inartificially drawn, sufficiently alledges, as we think, the fraud and the damage done to the plaintiff thereby.

To charge that a representation was falsely and fraudulently made, seems to us a substantial charge that the defendant knew it to be untrue. The authority from *Willes*, 584, is in point. It may reasonably be presumed that Caldwell, before he built his house or cleared his field, ascertained the lines of the survey, and should have been trusted in representing that they had been made upon the tract, and were included within the lines of the tract of land sold to Buford. A man of ordinary prudence would have ascertained the truth, and the law will presume that he had done so. Under such circumstances, to state what is not known to be true, is just as criminal in the eye of the law as to state what is known to be false; since the injury to the party confiding in such misrepresentations, is as great in the one case as the other; and it is this injury only to which the law looks, and which it seeks to redress, where the misrepresentation is of a matter not reasonably supposed to be within the knowledge of the defendant, and in which he should be trusted, but of a thing equally known to both parties, or about which both parties had equal means of information, and in regard to which they are equally negligent, neither law nor equity will afford relief; this however is not that case.

The defendant knew, or ought to have known, the whole truth; and the plaintiff is not to blame for having trusted to his representations. The judgment of the Circuit Court is therefore erroneous, and must be reversed, and the cause remanded to that Court with directions to overrule the demurrer, and proceed therein conformably (480) with this opinion.

M'GIRK, C. J., dissenting.

I am of opinion that the plaintiff cannot recover. It seems to me it should have been charged in the declaration, that the defendant fraudulently made the representations. The declaration says the representations were false and fraudulent, but does not say they were so made.

It appears to me that the mistake existing in the case, is only a mistake of innocence; it is mutual, the means of correct knowledge were equally open to the plaintiff as well as the defendant. The plaintiff should have assured himself how the lines would run. Before he can have any equity, he should offer to rescind the contract. The land he has may be more valuable than the land he did not get; he ought not to keep the land he got by mistake, and get the value of the land he supposed he was to get.

THE STATE v. WATKINS.

In an order made to suspend from practice an Attorney of a Court, the cause of suspension must be in the order itself, and the order must alledge the precise cause for which the suspension is made.

SUSPENSION from practice as an Attorney at Law, &c.

M'GIRK, C. J., delivered the opinion of the Court.

It appears by the record that in the Circuit Court of Ralls county, Ezra Hunt, an Attorney of that Court, gave information to the Court that certain dates in a record had been altered, and that he believed and charged the fact to be that Watkins, also an Attorney of that Court, had altered the same; whereon, by order of the Court, certain interrogatories were propounded to Watkins, which he declined to answer; (481) the Court thereupon suspended him from practice for a certain time, and certified the proceedings to this Court.

The question is now made whether the Court erred. We are of opinion the order, as it stands, must be set aside. The law is express that the cause of suspension must be in the order itself, which is not the case here. The order should alledge the precise cause for which the suspension is made. In this case, if it were proved that this man had altered the record, then the order should show that fact, and then the suspension should follow.

The requisition of the Court, that the party should answer on oath, would be good on a pure question of contempt; this requisition is not to accuse the party, but to let him purge himself if he can; after the act has been otherwise established, the regular proceeding in this case would have been, when the information was given, to have issued a rule or citation, to call on the party, when the act was done out of the presence of the Court, to show cause why he should not be suspended for the acts complained of. When the contempt is committed in the presence of the Court, a rule is sufficient; and when the party appears, proof is made of the facts, then the order of suspension or a discharge of the rule is made, as the proof warrants. The order is set aside, the cause is remanded, the Circuit Court will proceed with the proof, &c., without any new notice to the defendant.

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MORTON v. MASSIE.

1. Declarations made by one likely to become heir of an estate, in the life-time of the intestate, as to the condition of his property, will not be permitted, after death, to be given in evidence.
2. A relinquishment by the husband to a co-heir of the distributive share of the wife to lots belonging to the estate of her deceased father, is no bar to the husband's subjecting the same lots to any just demands which he may have against the estate of the deceased.

APPEAL from the Circuit of Marion county. In Chancery
TOMPKINS, J., delivered the opinion of the Court.

Morton files his bill against Massie and others, and had a decree in the Circuit Court of Marion county, sitting as a Court of Chancery, from which Massie appeals to this Court.

Morton charges in his bill, that sometime in the year 1821, one Hugh Shannon, senior, purchased of one John McCune, two certain lots of ground in the town of Palmyra, in said county of Marion; that the deed for said lots was made by McCune to Hugh Shannon, senior, but that the purchase money was paid by Hugh W. Shannon, junior; and that sometime in the year 1825 or 1826, said Hugh, senior, made his last will and died, devising to said Hugh W., his son, the lots aforesaid; that said Hugh W. had taken possession of said lots and built on them, and hitherto kept possession of them; that the purchase of said lots was made for the use of Hugh W. Shannon, and since the death of Hugh Shannon, senior, his heirs had transferred all the interest they might have in said lots to said Hugh W. Shannon; and that in November, 1829, Morton the complainant became the purchaser of said lots at a Sheriff's sale, not knowing of any claims or pretensions to them except those of Hugh W. Shannon, against whom the execution aforesaid was issued; that since the time he purchased said lots as aforesaid, the said Massie the defendant who is married to one of the heirs of Hugh Shannon, senior, and who, he was informed and (483) believed, had relinquished his interest in said lots to said Hugh W., had administered on the estate of said Hugh, senior, and claimed to subject the said lots to the payment of the debts of the deceased, and particularly to the payment of one which said Massie claimed to be due to himself from the estate of said deceased, and was proceeding to subject the said lots to the payment of such debts as might be proved against the estate of said deceased, and prays that said Massie may be restrained, &c.

Massie answers, admitting himself to be administrator of deceased; denies that the lots aforesaid were paid for by Hugh W. Shannon, and that the heirs of Hugh, senior, had conveyed all their interest in said lots to said Hugh W. Shannon; he says that he signed an instrument of writing conveying all his right, as distributee of said deceased, in said lots, on condition that all the other distributees would also sign said writing, and upon condition that Hugh W. would satisfy and pay this respond-

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ent a claim or debt due him from the deceased, to the amount of seven hundred dollars, none of which had been paid, and denies that the complainant was a purchaser without notice, &c., and claims said lots as administrator; he also denies that the deceased made a will.

McCune, a witness, states that he made the contract with Hugh W. Shannon for the lots, and received pay from him; and does not know that Hugh, senior, was present at any time, either when the bargain was made or when payment was made, but that the deed was made to Hugh Shannon, Senior. It was proved that in 1819, Hugh Shannon, Senior, moved to Missouri, and in 1821, Massie, the defendant, also came and brought on property for Hugh, Senior, part of which was delivered to McCune in payment for the lots aforesaid.

It was proved by the complainant, that Massie the respondent, had declared that all the property brought by Hugh, Senior, belonged to Hugh W., and that he procured the father to make a deed for a lot which was bought of McCune at the same time the lots in question were, and which he had sold and for which he received the money.

(484) On the contrary it was proved by the respondent that the father was, with great difficulty, prevailed on by his wife to make the deed, and asserted his determination to keep the remainder of the lots for the use of his old age. Hugh W. Shannon testified that the lots in question and others at the same time, were purchased by his father from McCune and paid for by him in property brought from Kentucky as before mentioned; he says it consisted of chains, saddles, bridles, &c., which his brother had sent to his father to satisfy a debt which his brother owed to his father. Witness says he spoke to his father about purchasing the lots, but cannot state whether he alone, his father alone, or both of them together, spoke to John McCune about them.

For the complainant, it is contended that Hugh, the son, having purchased the lots and paid for them, the conclusion necessarily follows that they were purchased with his own funds; and this presumption is strengthened by the declaration of Massie, that all the property brought by Hugh, Senior, to Missouri, belonged to Hugh the son; and consequently, the father would hold the property of the son as trustee for the sons creditors, and they rely on 11 Johnson's Rep. 91. 16 J. R. 197. 13 same 463.

On the other hand, the counsel for the defendants contend, that the evidence given sufficiently establishes that the property with which the lots were bought, belonged to the father, as it was brought to the country by Massie two years after Hugh Shannon, Sen'r. came, and could not in strict parlance be said to be brought to the country by Hugh Shannon, Sen'r. The circumstance, too, of the deed being made to the father, it was contended, contributed to raise the presumption that the son throughout acted for his father.

It may be observed that the declarations of Massie are not competent testimony in this case. Those of Hugh Shannon, Sen'r. would have been, as they would have been contrary to his own interests; but these declarations of Massie being made in the lifetime of Hugh, Sen'r., were not admissible, but not being objected to, they, as (485) well as much other testimony in this cause, have been acquiesced in by each party by an implied consent. They are certainly entitled to but very little credit, a careless conversation, perhaps inaccurately repeated, and not well remembered, ought

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to have but very little weight. Such is the character, we think, of these declarations. We are decidedly of opinion that the weight of testimony is for the defendant, and that the funds with which the lots were purchased belonged to the father. The answer of Massie fully refutes the very slight presumption raised by his declarations in the lifetime of the intestate. That all the property brought by Hugh the father, belonged to Hugh the son. For he denies in the most explicit terms, that the lots were purchased by Hugh the son.

We are moreover of opinion, that his relinquishment to Hugh W., of his distributive share of the lots in right of his wife, would be no bar to his right to subject the same lots to the payment of any just demand he might otherwise have against the estate of the deceased, even had such relinquishment been proved. In our opinion the Circuit Court erred in decreeing for the complainant; its decree is therefore reversed, the injunction dissolved, and the bill dismissed.

WASH, J., dissenting.

In this case, I dissent from the opinion of the Court. The bill, it is true, sets out the matter in a lame, confused and somewhat contradictory manner; my understanding of it is, that it charges *the purchase to have been made in the name of the father for the use of the son*; that is, that the deed for the land had been taken in the name of the father, who thereby became in law the purchaser, but that the money was advanced by the son, who caused the title to be made to his father, with an understanding that it should be held in trust for the son. From the interrogatories, the answer and the evidence taken on both sides without objection, it seems to me clear, that the respondents so understood the charge as collected from the whole bill. This charge, it seems to me, has been sustained by the testimony taken in the cause. The (486) father before the removal of the parties to Missouri, is shown to have parted with the forty acres of land reserved for his support upon the division of his estate in Kentucky, to his son James, who undertook to support his father, &c. Afterwards the respondent Hugh is seen exchanging with his brother James the portion of land allotted to him in the partition, for James' land, and taking upon himself the care and support of their father. Then the old man, James and Hugh are seen uniting in a conveyance of about seventy acres of land, including the family residence and the forty acres reserved originally for the father's support; and it is clear, that from the proceeds of this sale the lots in dispute were paid for. The terms upon which the transfer from the old man to his son James and upon which the exchange between James and Hugh were made, do not appear. The legal estate to the land conveyed by them jointly, seems to have been, however, in the son Hugh. This fixes the fund out of which the lots were paid for, and this fund was Hugh's. The improvement of the property by Hugh, his receipt of rent for the buildings erected thereon, his sale of one of the lots and the subsequent conveyance of the old man in accordance with Hugh's contract, with the ineffectual effort made by him to convey by will the residue of the lots to his son Hugh, taken in connection with the evidence of McCune, that the old man had not been seen or known in the contract for the sale of the lots, and that payment for the same had been made by young Hugh, altogether satisfy my mind that it was intended from the first that the lots should be held in trust by the father for the son. But this is not now a question between the *cestui que trust* and the trustee; nor between the general creditors of the trustee (or

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person holding the legal title) and the *cestui que trust*. The proof in such a case might perhaps be deemed inadequate; here Massie, one of the heirs or distributees of the old man, and the son who might claim as *cestui que trust*, are seeking, as is clearly shown from their answers, and a mass of testimony in the cause, to place the fund which belongs in equity to the son, out of the reach of Hugh's creditors, by (487) subjecting it to the stale demand of the brother-in-law, Massie; who had lain by for three or four years during the old man's lifetime, and for three or four after his death; and who had not only declared that the heirs of old Hugh knew that all the property brought from Kentucky belonged to young Hugh, but had shortly after the death of the old man, executed a release to young Hugh of all his interest as distributee in the estate of the old man, and particularly to the lots in question. So far as Massie and young Hugh are concerned, I think the decree of the Circuit Court should stand.

BARTLETT v. DRAPER.

The office of a bill of exceptions being to save facts that occur in the trial, it is necessary that such facts be set forth in the bill, otherwise the Court above can have no grounds to reverse the judgment of the Court below.

APPEAL from the Circuit Court of Marion county.

Judge WASH being indisposed, not sitting.

TOMPKINS, J., delivered the opinion of the Court.

Bartlett brought his action of assumpsit in the Circuit Court of Marion county against Draper, and had judgment there, and to reverse the judgment of that Court Draper appeals to this. The bill of exceptions is in these words: "Zachariah G. Draper comes and moves the Court to set aside the verdict of the jury in the above cause, and grant a new trial for the following reasons:

First. After the jury retired from the bar to consult as to their verdict, two of the jurymen left the jury room, and remained absent for and during the night, without leave of the Court or consent of the parties.

Second. The verdict of the jury is against the law and testimony.

(488) Third. The defendant was taken by surprise in the introduction of another new item in the plaintiff's bill of particulars, which the Court, on motion, struck out of said bill of particulars, believing that he would be confined to said bill of particulars by him filed; and that he could not travel out of that bill; and that if the

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defendant had known he would be permitted to add the one hundred dollars spoken of in the deposition of Hiram Woodsworth, it not being found in the bill of particulars, he, the defendant, would have introduced witnesses to prove that Woodsworth was mistaken, and that no such sum of one hundred dollars was paid by Bartlett to said defendant, or to James L. McGill as his clerk, at the time mentioned and described in the said deposition of Hiram Woodsworth; and the said defendant alledges that no such sum of one hundred dollars was charged or mentioned in the plaintiff's bill of particulars, as testified by said Woodsworth.

Fourth. The Court erred in instructing the jury, that they might find other sums of money due the plaintiff than those charged in his account filed.

Zachariah G. Draper, the above named defendant, makes oath and says, that he was taken by surprise on the trial of the above cause in this, that the plaintiff introduced the deposition of Hiram Woodsworth to prove the sum of one hundred dollars paid by Bartlett to the said defendant's clerk, which said one hundred dollars was not charged in the bill of particulars filed in the cause, and it was not known to said defendant that he did claim or could claim any sum or sums other than those set forth in the bill of particulars, and particularly that proved in Woodsworth's deposition, that he could have introduced evidence to show that Woodsworth was mistaken, and that no such sum of money was paid at the time stated in said deposition, either to the said McGill, as clerk of the said defendant, or to the defendant himself, and this he believes he is able to prove by other disinterested evidence. Signed by the defendant.

The bill has the usual conclusion, and is signed by the Judge. Thus it is seen that (489) the defendant moved for a new trial for reasons filed and copied into the bill of exceptions; and that he also filed an affidavit, which is also copied into the bill.

The office of the bill of exceptions is to save facts that occur on the trial, which might otherwise be disputed; and the Judge of the Court, if the statements made in the bill be true, is required to sign such bill, and the bill then becomes a part of the record. The bill then, being a part of the record, proved that the defendant filed reasons for a new trial, one of which reasons was, that after the jury had retired from the bar to consult as to their verdict, two of the jury left the jury room, and remained absent for and during the night, without leave of the Court or consent of the parties; but can it be said that the bill of exceptions contains any admission of the truth of the statement? Again it is stated in the affidavit of the defendant, that on the trial of the cause he was taken by surprise in this, that the plaintiff introduced the deposition of Hiram Woodsworth to prove the payment of one hundred dollars to the defendant's clerk, which said sum of one hundred dollars was not charged in the bill of particulars. The Court might, for any thing we see in the bill of exceptions, have had no bill of particulars or depositions before it; or if it had such bill and deposition before it, it might have seen by inspection that the defendant's complaint was unfounded. It is very true, that some depositions or copies of such are attached to the record of the Clerk, and that a bill of particulars is copied into the history of this cause by the Clerk, but they certainly constitute no part of the record. The language of the statute is: "If during the progress of the trial in any civil cause, either party alledge an exception to the opinion of the Court, and he that alledgedeth the exception doth write the same, and prays the Judge to allow it, and sign and seal the same for a testimony, the Judge shall do so." Now the attestation of the Judge only proves that the defendant's attorney filed certain reasons for a new

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trial, and an affidavit of the truth of some of them. How easy a matter for the counsel to have written thus: "On the trial of this cause it was proved, that after (490) the jury retired to consult as to their verdict, two of the jurors left the jury room," &c. The attestation of the Judge would then have proved the truth of the statement. It does not appear to us that the Circuit Court committed any error. Its judgment is therefore affirmed.

BARTLETT, ADM'R OF GARRETT, v. HYDE.

The property of every person who dies in this State, whether citizen or stranger, is subject to the course of administration provided by our statutes, and is regarded as in the custody of the law, for the benefit of all persons interested.

APPEAL from the Circuit Court of Marion county.

WASH, J., delivered the opinion of the Court.

This was an action brought by Bartlett, the defendant in error, against Hyde, the plaintiff in error, in the Marion Circuit Court, in which Bartlett got judgment, to reverse which Hyde has appealed to this Court.

The testimony is preserved by a bill of exceptions, from which we collect that on the 9th day of November, 1832, Bartlett, the defendant in error, applied for and obtained from the County Court of Ralls county, letters of administration on the estate of one Spillsbury C. Garrett, who came as a traveler and a stranger to the house of Hyde, the plaintiff in error, where he (Garrett) was taken sick and died after a few days, leaving three hundred and forty-five dollars, which came into the possession of Hyde; that on the 12th day of November, 1832, some person (not named in the record) obtained letters of administration upon the estate of Garrett in Kentucky; and that Hyde paid said money to said administrator from Kentucky, at the county of Ralls, on the first day of December, 1832; that the defendant (Hyde) also offered to (491) prove that all the expenses of the last sickness of said deceased, at the house of said defendant, were paid and settled; by whom, to whom, or when they were paid, is not shown. The Circuit Court excluded the evidence of payment to the Kentucky administrator, as also the evidence offered to prove payment of the expenses of the last sickness. The plaintiff in error excepted to the decision of the Circuit Court in excluding the evidence, and now assigns it for error.

It seems to us clear that the Circuit Court decided correctly in excluding the evidence. The property of every person who dies in Missouri, whether domiciliated

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or not, citizen or stranger, becomes subject at his death to the course of administration provided by our statutes, and is regarded as in the custody of the law, for the benefit of all persons interested. It is equally the right and duty of the administrator to collect and account for the assets to the creditors and others entitled to distribution; to dispose of the property before administration, would constitute an executor *de son tort*, and render the party liable to an action. If this course were permitted, it is clear that the provision of the law which secures to the State the property of a person dying without heirs, might be and most probably would be entirely defeated. The hardship of the case, which was so much pressed in the argument of the appellant's counsel, is no where to be found in the record. Hyde may have been negligent in paying over the money to the Kentucky administrator, without an indemnity properly secured; and if so, will have to bear the loss, but neither laws nor Courts can shield a man from the consequences of wilful negligence or folly. For aught that appears on the record, or this Court can know, there may be creditors or distributees in Missouri, who would be put to much trouble and expense, and might suffer great injury and entire loss, by having to resort to the Kentucky administrator. The question however is not of hardships on one side or the other, but of law; and we think the clear and positive enactments of the statute, as well as the reason and justice of the case, are with the appellee. The judgment of the Circuit Court is therefore affirmed with costs.

Decisions of the Supreme Court of Missouri.

ST. LOUIS DISTRICT, OCTOBER TERM, 1834.

MULLANPHY v. SIMPSON,

AND

RUSSELL v. MULLANPHY.

1. In case of mortgage, the statute of this State gives the mortgagee, on failure of the mortgagor to pay, the right only of recovering his debt and damages.
2. A mortgagee petitioning to foreclose a mortgage, is not required to give notice to a subsequent mortgagee of his intention to foreclose, no more than a prior judgment creditor is bound to give notice to a subsequent judgment creditor of his intention to sell.
3. A Court of Equity will permit a subsequent mortgagee or his alienee to come in and redeem, but he must come and not wait to be called.

APPEAL from the St. Louis Circuit Court, sitting as a Court of Chancery.

Judge WASH, having been counsel in this cause, retired from the bench.

TOMPKINS J., delivered the opinion of the Court.

In the month of October, 1822, Robert Simpson and Wilson P. Hunt filed their bill against John Mullanphy, Pascal L. Cerre, —— Holmes, Andrew Elliot, and Thos. Hanly. In June, 1826, William Russell and the aforesaid complainants filed a supplemental bill against the defendants in the original bill, except Hanly, who had died; answers were filed and replications. In the Circuit Court a decree was made for Simpson, and the bill was dismissed as to Hunt and Russell. Mullanphy appeals to reverse the decree in favor of Simpson, and Russell appeals to reverse the decree dismissing his bill. These three persons are all whom

Mullanphy v. Simpson.

(493) it is necessary to notice, as the case is now presented to this Court. From the evidence in the case, it appears that some time in the year 1817, Cerre sold to Hanly a square of ground in the town of St. Louis, and that to secure payment for it, Hanly mortgaged the same to Cerre; afterwards Hanly sold a part of said lot to Patrick M. Dillon. This part was taken off the south side of the said square, and was 35 feet front on Main street, and ran 150 feet east to the river, the width continuing the same. Afterwards, Dillon sold the part he had purchased to Rufus Easton. This part purchased by Easton was divided by him into two parts, viz: No. 1, fronting on Main street; and lot No. 2, on the river. These lots, being sold on execution against Easton, Simpson became the purchaser of lot No. 1. But Mullanphy had previously purchased the same lot sold on another execution older than that under which Simpson had purchased; but issued on a younger judgment. Hunt became the purchaser of lot No. 2, and conveyed it to Easton, who sold and conveyed lots No. 1 and 2 to Russell. Hanly had also assigned to Mullanphy the mortgage Dillon had given to him to secure the payment for the part of the square, sold by him to Dillon, and which had been divided into lots No. 1 and 2. On the petition of Cerre the whole square had been sold to satisfy the mortgage made to him by Hanly, and Mullanphy had become the purchaser, and Cerre had assigned to him the mortgage deed of Hanly. The object of the bill was to obtain leave for Simpson to redeem lot No. 1, and for Russell to redeem both lots. The points arising are,

First. Whether the petitioners are barred by the order to sell, to satisfy the mortgage made to Cerre.

Second. Whether an equitable interest can be sold on execution, and

Third. Whether Mullanphy, purchasing under the elder execution and younger judgment, has a better right than Simpson. Cerre, Hanly being dead, caused his widow and infant children to be summoned, and they not being found, the Court awarded an order of publication which was accordingly made. It is objected, that (494) in conformity with the practice in chancery, Easton, Simpson and Russell ought to have been made defendants to the bill, and that guardians *ad litem* ought to have been appointed to the children, all of whom appear to have been minors. The statute in force when Cerre commenced this proceeding reads thus: "Any person holding an instrument in writing purporting to be a mortgage on lands and tenements shall be permitted to sue out a petition to the Circuit Court of the county where the mortgaged property lies, stating the instrument of writing containing the mortgage, and requiring the mortgagor, his heirs or representatives, to appear at the next succeeding Court, and show cause why the mortgaged property should not be foreclosed and the property sold to pay the debt due to the petitioner." At common law, the consequence of failing to pay the money on the day appointed was, that the land mortgaged was forfeited. Land being most commonly mortgaged to secure the payment of very inconsiderable sums of money, far below the value of the land, the Courts of Chancery early interposed to prevent so great an injustice; and compelled the mortgagee to file his bill in equity, and to bring in all parties interested, as well the alienees of the mortgagor as the mortgagor himself, to show cause why the land should not be forfeited.

Our statute gives the mortgagee, on the failure of the mortgagor to pay, the right only to recover his debt, and damages. It is difficult to perceive with what justice then, even our legislature could impose on the petitioner the duty of giving notice to such persons as might have found an interest in taking a subsequent mortgage on such

Mullanphy v. Simpson.

land, of his intention to proceed to make his money; but it was urged, that if the land were sold for more than was necessary to pay the debt due to the petitioner, the surplus might be paid over to the mortgagor; this is very true, but it is equally true, that it was the fault of the second mortgagor to take his mortgage on property that had been before mortgaged.

And in such case, a court of equity can see no more reason why the petitioner should be held to give notice to a subsequent mortgagee than a prior judgment creditor should give notice to a subsequent judgment creditor of his intention to sell; in (495) either case, the surplus, if any, ought to be paid over to the owner of the land sold. The act of assembly requires that the petitioner cause to be summoned the mortgagor, his heirs, or representatives. For the purpose of paying the debts of the deceased, the executor or administrator is the representative of the deceased, unless the creditor choose to proceed against the heir to whom land has descended. It does not appear that Hanly had either executor or administrator; then it is not necessary to decide whether it was necessary for the petitioner to summon the one or the other of them. The subsequent mortgagees had sufficient constructive notice; there can be very little doubt but a court of equity would permit a subsequent mortgagee, or the alienee either of Hanly or Dillon, to come in and redeem, but as under our law, it is an act to be permitted for his own benefit only, and as the first mortgagee is in all events entitled only to his debt and damages, the alienee must come, and not wait to be called, as in the English courts of chancery, by the first mortgagor. Easton, Hunt or Russell might have administered, or they might have caused guardians *ad litem* to be appointed for the minors, as easily as the petitioner could, and the statute did not require him to do it. The reason why in the English courts, all persons, acquiring an interest in the mortgaged property subsequent to the making of the mortgage, should be summoned before foreclosure, not existing here, the rule ought not to be enforced here. It would be an act of injustice, even in the legislature, to make it his duty to do so, and accordingly that body has, we think wisely, omitted to do so. We are decidedly of opinion that it was not the duty of the petitioner to summon any one of those who had acquired an interest under Hanly, or under Dillon, the alienee of Hanly; this being our opinion, it becomes unnecessary to say any thing about the other points made in the cause. We are therefore of opinion, that the decree of the Circuit Court dismissing the bill as to Russell ought to be affirmed; and that its decree in Simpson's favor ought to be reversed, and this Court proceeding to make such order as the Circuit Court should have done, do order and decree that the (496) bill as to Simpson also be dismissed and that as to Russell affirmed.

RUGGLES v. THE COUNTY OF WASHINGTON.

1. The territorial legislature of this State, when it was a territory, had no power to pass retrospective laws, impairing the obligation of contracts.
2. Where, by an act of the legislature, commissioners are appointed to fix a county seat, &c. on a lot of ground, not less than 50 nor more than 200 acres, and the commissioners are unable to procure more than 40, and cause public buildings to be erected on the same, an act of a subsequent legislature confirming the acts of the commissioners, impairs no private rights which originated for acquisition by the commissioners of forty acres only.
3. It is a settled principle of law, that, where an agent does any act for the use of his principal, and the principal enjoys the benefits and fruits of the act, he shall not afterwards be allowed to say that the act was illegal.
4. Where commissioners have been appointed, by an act of the legislature, with power to cause public buildings in a county to be erected so soon as sufficient funds shall have been obtained for the same by the sale of town lots, and proceed to let out the said buildings before having the necessary funds in hand, they render themselves individually liable; the county is not bound for their contracts for said buildings, because they have not pursued their authority.
5. But where the act of the legislature makes the commissioners the judges of the kind of building to be erected and whether the sum is sufficient to accomplish the object, and the estimate is to be made on the sum procured, and not on the sum raised and collected, they will be regarded as having pursued their authority, and the county will be liable for the contract they have made.
6. When a principal refers any act to the judgment or discretion of his agent, and the agent acts erroneously, the principal is nevertheless bound.
7. Statutes must be understood and interpreted with reference to their context and subject matter.
8. Long acquiescence in the act's of an agent, and the enjoyment by the principal of the fruits of the agency, is strong evidence of the correctness of the conduct of the agent, and of the liability of the principal.
9. A principal may recognize an authority *ex post facto*, and make the act his own.

ERROR to Washington Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of debt brought on two bonds, made by certain persons calling (497) themselves commissioners for the county of Washington. On the trial, under the instructions given by the Court to the jury, a judgment of non-suit was suffered by the plaintiff. The defendant pleaded *non est factum* to the bonds, and the statute of limitations to the counts on simple contract, and payment to the whole. On the issue of *non est factum*, the plaintiff gave in evidence an act of the General Assembly, passed in the year 1813, erecting and establishing the county of Washington. By which act, it is provided that Lionel Brown, S. Perry, J. Hawkins, M. Ruggles and J. Andrews, be and they are hereby appointed, commissioners, with full powers to point out and fix upon the most suitable and convenient place in the aforesaid coun-

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ty, for erecting a Court House and Jail thereon; and the place to be agreed on by them, or a majority of them, shall be, and is hereby declared to be the permanent seat of justice for Washington County. The 4th section of the act declares, that the said persons are thereby declared to be commissioners of the Court House and Jail of the County of Washington, and they, or a majority of them, shall be, and they are hereby fully authorized and empowered to purchase, or otherwise procure a title in fee simple for such lot of land as they, or a majority of them, shall judge most convenient for the seat of the aforesaid public buildings, containing not less than fifty acres nor more than two hundred acres, and they are authorized to take and receive to them, their heirs, &c., a good general warranty deed, &c., in trust for the County of Washington; provided, they shall not give more than ten dollars per acre for said land. They shall sell the lots on credit, not exceeding a year, or for cash, as they shall deem expedient for the good of the county, and they shall make deeds to the purchasers when the purchase money is paid, and the proceeds of such sale, after paying the purchase money, shall be by them applied and appropriated to carrying the objects of this act into full force and effect; and so soon as the commissioners herein named, shall have procured a sum which may by them be deemed adequate to building a Court House and Jail, or either of them, by sale of the aforesaid lots, by gifts, subscriptions or donations, they are empowered to let the buildings aforesaid, or either of them, to the lowest bidder on such plan as they may deem proper. The 5th section, directs that the commissioners shall take an oath, and give bonds for the faithful performance of their duties. The condition of their bond is, that they will well and truly, faithfully and honestly, appropriate and dispose of all money, property, &c., which shall come into their hands as commissioners aforesaid, for the use of said county, to the sole use and benefit of said county; and that if there should be a balance in their hands, after accomplishing the objects of the act, then they will, under the direction of the County Court, pay the same over to the County of Washington. By the 5th section, they are also required to make settlement with, and render an account to the County Court at each term. The 6th section provides for supplying vacancies. The 8th section provides for final settlement with the County Court. It appears also by the record, that the commissioners did proceed to execute their duties; that they procured by gift of Moses Austin, 40 acres of land, and of J. R. Jones, 10 acres; that Austin made title to them of the 40 acres, but that before any title was procured from Jones, they laid the whole off into lots, and sold the same on a credit of 4, 8 and 12 months. That Jones refused to make title, and never made any. It was also proved that in the year 1814, after the sale of lots, the commissioners let the building of a Court House to one Cravens, who failed; that Cravens was sued on his bond, and that damages were recovered against him; they then let the building of a Court House to Ruggles, the plaintiff, for \$7,000; that Ruggles built the said house, and that in the year 1818 or 1819, the county began the use of the house as a Court House, and have ever since used it as such; that the bonds sued on, were given by the persons whose names are signed thereto for the last payment after the work was done. It also appears that some resignation took place and that the persons whose names are signed to these bonds, were regularly appointed, and were commissioners when they signed the bonds. It also appears by the record that (499) on the 30th of January, 1817; the Legislature passed an act whereby they recited the fact, that the commissioners had only procured 40 acres of land on which they had fixed the seat of justice for Washington county. It is therefore enacted that said location

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shall be the seat of justice for Washington county, and that the same shall be as legal and permanent as if the commissioners had procured complete title to fifty acres of land. Upon this state of facts, the counsel for the county prayed the Court to instruct the jury, that the plaintiff could not recover; which instruction the Court gave, and a verdict was rendered for the defendant. This instruction is assigned for error. With a view to dispose of this case, we must attend to the objections made by the defendant's counsel to the plaintiff's right to recover. It is objected, that the commissioners did not pursue their authority, without which the deeds for the payment of the money were not the deeds of the County of Washington. The first specification under this head is, that the original act required the commissioners to procure fifty acres of land, whereas they only procured forty. And it is argued by Mr. Gamble, for the county, that the subsequent act could not cure the defect, because the act is retrospective, and that the original contract with Ruggles was made before the act was passed; that it was void as against the county, and that the subsequent contract, or bonds being predicated upon it were void also. To this it is answered by Mr. Bates, for the plaintiff, that the first act is merely directory to the commissioners, and that the main thing to be done by them was to locate a seat of justice and build public buildings, and that, if they failed to procure the quantity of land required, they are liable to the county on their bonds; but if this position is not correct, then the act of 1817 cured the defect. It may be true that the plaintiff's first position is correct. But we think the validity of this contract can with more safety rest on the amendatory act of 1817.

We are not prepared to admit that the Territorial Legislature of 1817, could pass retrospective laws impairing the obligation of contracts, or impairing private rights; yet they had large powers given to them by the act of Congress of 1812, which says (500) they shall have power to make all laws for the good government of the people. Now it is clear, that the good government of the people might require new counties to be laid off, and might require Court Houses and Jails to be built: they then were the fountain of authority on this subject; they were the guardians of the public good; they gave authority here to procure 50 acres of land, and required the site should not contain less; but only 40 acres could be obtained in a suitable place, they then declare 40 acres will do.

Here no private right was infringed, but we find the county content on this subject; we find her, by her officers, up to the time of bringing this suit, constantly recognizing the validity of the amendatory act, and the validity of the acts of the commissioners as to the location of the seat of justice on the 40 acres, and the validity of the contract with Ruggles. As soon as the Court House is finished in 1818, or 1819, the County Court took possession of it, and have used it ever since as a Court House. They, for the benefit of the county, have had the use of the house for at least fifteen years, they then discover some supposed flaw in the original contract, by which they attempt to avoid payment to the builder; this looks like an after-thought, and is not entitled to the favor of law.

We think it is a settled rule of law as well as justice, that where an agent does any act for the use of his principal, and the principal enjoys the benefit and fruits of the act, it is too late afterwards for him to say, the act was not legal, or was not by his authority; a person may by matter *ex post facto* ratify the unauthorized acts of an agent: see to this point 2 *Starkie on Ev.* p. 58. We see no reason why the county, acting by her County Court, cannot do the same. We are of opinion the Coun-

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ty of Washington cannot avoid the payment of these bonds on this ground. The next specification of the objection that the commissioners failed to pursue their authority, is, that they were not authorized to build a Court House, and contract for the building the same, till they had funds sufficient by the sale of lots, gifts, and donations, to do so; and if they had not the funds, when they made the contract, the (501) county could not be bound to pay for the work, and if they had funds, they were only authorized to charge those funds, so that the county could, in no event, be bound to pay for the work, or any part thereof. To sustain this point, the case of *McClintocks v. Bryant et al*, decided by this Court, is cited, 1 vol. *Missouri Rep.*, 598. It is conceded by the plaintiff's counsel, that if the case at bar is not distinguishable from the case cited, the decision ought to be against him. We will proceed to compare that case with this. In that case, it appears the defendants pleaded, that they were commissioners for the County of Montgomery, for the purpose of selecting a site for building a Court House and Jail, that they selected said site, laid the same off into lots, sold the same on credit, bargained for the building a Jail, and gave the notes sued on for the building the same, and for no other purpose; and that they never have had at any time, any of the money arising from that sale in their possession, &c. The note or bond, in that case, was signed by them as commissioners for the sale of lots in the town of Pinckney, which was an entire mis-description of their official character. The fourth section of the act erecting Montgomery county, provides that the lands acquired by them shall be laid off into lots, and shall be sold for ready money, or on a credit not to exceed twelve months; and that when the purchase money is paid, and not before, the purchaser shall have a title. The section then goes on and says, and the proceeds of such sale or sales, after paying the purchase money or price of such lands, shall be by them applied and appropriated, first to the building a sufficient Jail, and the remainder, if any, towards building a Court House.

The Court decided that the commissioners had not pursued their authority, because the law required them to have the funds in hand before they made any movement in respect of building a Jail; instead of this, they did not wait for that event, but as soon as the lots were sold, they, on the credit of the sale of the lots, hired the building a Jail, and indeed their plea shows they never possessed the funds, for it says they had not at any time before that time received any funds from the sale of (502) lots. The opinion goes on to say, "the true and apparent construction of the act is, that the commissioners are not required to let the building, till they have received the money for the lots, because before that time there can be no proceeds. If we take it then that the commissioners obeyed the act, they had the money when they let the Jail; and if they had it not, they ought to have had it, because the law was so;" on the ground then that the Montgomery commissioners were entirely premature in building the Jail, the Court held they were liable, if they had used words sufficient to charge them individually, and on that point there cannot well be any doubt. In the commencement of their bond, they call themselves commissioners for the sale of lots in Pinckney, a name unknown to the law under which they pretended to act; they signed the bond with their proper names. Let us now see what was the authority given by the act establishing the County of Washington: the act authorizes the building a Court House and Jail, or either of them, on the existence of certain things. The 4th section of the act, like the Montgomery act, requires the lots to be sold on credit, or for cash in hand, and requires payment for the

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lots to be made before a title is made, and then it says the proceeds of such sale or sales, after paying the purchase money, shall be by them applied and appropriated to carrying into effect the objects of the act. So far, the exact application of the proceeds have not been pointed out, so far the Legislature clearly intend the commissioners shall get the money for the sale of lots; but they do not at once declare as they do in the act of erecting Montgomery county, what shall be done with those proceeds. Now comes the power in the Washington act to build a Jail and Court House. It is declared thus: "and as soon as the commissioners shall have procured a sum which may by them be deemed adequate to building a Court House, a Jail, or either of them by the sale of lots, by gifts, subscriptions or donations, they are hereby authorized and empowered to let the building aforesaid, or either of them, to the lowest bidder, giving thirty days notice of the time of letting and of the plan," &c. (503) Here we think is a striking difference between this case and the case of Mc Clintocks v. Bryant et al.

The act in this case relies entirely on the judgment and honesty of the commissioners; they are the judges of the kind of Court House wanted for the county; they also are the judges whether the sum they rely on is sufficient to accomplish the object; the estimate is to be made on a sum procured by the sale of lots, and not on the money raised and collected from the sale. Now, if in this they err, it is not to be supposed they would be guilty of perjury under their official oaths, or be liable for such error on their official bonds; the matter is referred to their judgment and honesty. But it is argued, that "procure" in the act means, that they must have the money in possession, before they can proceed to make the contract. This argument can hardly be sound; when we look at the means put in their power, we know from the nature of such things, the Legislature could hardly expect the money to be in their possession before they might lawfully begin to build; the first thing to be done by them is, to sell the lots on a credit of not more than twelve months; out of this sale fund, they must, first of all pay for the land; when that is done, they must begin to consider what sort of a Court House is wanted, then the fund remaining by the sale of the lots, and also the fund which may have been raised or promised by subscription and donation, if their judgment satisfies them that the sum is sufficient, then they may begin to build. Now in this case, as a part of the sum, and indeed the whole of it, might have been procured by subscription, it would be difficult to tell before hand, how much would be actually paid when wanted. Subscriptions to such objects are not usually paid when the subscription is made, but usually the payment is postponed till the object of the subscription makes the payment of the money necessary, and then it is often found difficult to make the collection; this mode of raising money, precarious as it is, has been by the Legislature given to these commissioners, to found their estimate on; whether they did found any part of their estimate on subscriptions and donations, the record does not show. Mr. Brickey (504) says they founded their estimate on the lots sold in the 40 acres, and also on the lots sold in the ten acres, and on a judgment recovered against a former undertaker, who failed, and on the lots unsold before they let to Ruggles. What the sale of Jones' lots would amount to, what the other sales would amount to, and what was the amount of the judgment does not appear, but the witness says the whole amounted to more than Ruggles' bid. The precise value of the fund they made their estimate on, does not appear, nor is it necessary it should appear; we cannot now

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decide the question whether they erred or not in their judgment. The Legislature put the power to hire the building the house on the judgment and estimate of these men, and whether they erred or not is not the question; but the question is, had they when they made the contract, procured a sum which they thought sufficient; if they had, then they pursued their authority.

In this case the county of Washington is the principal, the commissioners the agents; we believe where the principal refers any act to the discretion or judgment of his agent, and the agent acts erroneously as to judgment or discretion, yet the principal is bound. The commissioners who made this contract, were emphatically the agents of the county; they were not the same appointed by the Legislature, but were appointed by the County Court. But it is argued by counsel, that by the terms of this law, the commissioners were required to have the cash in hand before they had any power to let the building, because the act says, when they shall procure a sum which they may deem sufficient, &c.; and they insist that "procure" here means that the money must be in their hands. We think this interpretation of the statute is not the correct one.

We must understand and interpret the words used by the Legislature in reference to the context and subject matter. Viewing this matter in reference to the subject matter, it will stand thus: the commissioners were to build a court house when their judgment should dictate the means were competent to the end; that judgment they (504)passed; means may in common parlance well be said to be procured, when solvent men's notes are in hand, payable within the time when the money was to be paid to the builder; and they were authorized to predicate their judgment on subscriptions too; a subscription of \$500 or \$50 made by a solvent and punctual man might be considered as so much procured; now if these things existed to the extent of the money promised for the work, we think the commissioners might well begin the building; and if they did not exist in fact, yet the commissioners might think they did, and then they might begin to build. There is no pretence, however, that the commissioners acted without some reasonable foundation to go on. The evidence is, that they made a part of their estimate on lots sold by them which did not belong to them; but the evidence further is, that the whole estimate exceeded the amount bid by Ruggles, how much is unknown; it might have been for a small amount or a large one, yet that makes no material difference, as they were constituted the sole judges of the adequacy of the fund, responsible on their bonds to the county for malfeasance if they acted corruptly, and responsible to the criminal justice of the country for perjury. It appears also that they had large funds raised in some of the modes pointed out by the statute. Ruggles bid the building off at \$7,000, he completed the work, has been paid all except \$1,000 deducted for a bad chimney, and \$1,070 now due; so that they have actually paid out of some fund for the use of the county about \$5,000. The present suit is for the balance; can it be competent for the county, after fifteen or sixteen years enjoyment of the fruits of this contract made by their agents, to deny the legality of the very contract which gave her this house so long? We think that it is not.

If this contract on the part of the commissioners had even been illegal in the beginning, yet when the county recognize the validity of the contract by using the house so long without objection, she makes the contract good.

The same rule before referred to in *Starkie's Evidence*, applies here, to-wit: that the principal may recognize an authority by matter *ex post facto*, and make the act

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(506) his own. See 2 *Starkie's Evidence*, pp. 58, 59. Upon this ground, this case, we think, is clearly distinguishable from the case of *McClintocks v. Bryant et al*; there nothing was left to the judgment of the commissioners, except as to the quality of the jail they would build, and having fixed that, they were required positively to have the fund in hand, which they acknowledged they had not, before they could make any contract for the jail. Also in that there was no evidence of subsequent recognition of the contract. In this case, the evidence is abundant. Several cases have been cited by counsel on both sides as to the general principle governing where public agents are and are not liable individually; there is no mistake about the general principle, but it does not, in our opinion, conflict with the plaintiff's right to recover. The judgment is reversed and remanded, with directions to set aside the non-suit and grant a new trial.

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GRAHAM AND OTHERS v. O'FALLON, EX^E.

1. The 6th section of the act of 1825, concerning Courts, gives to the Courts of Probate exclusive original jurisdiction in all cases relative to the probate of last wills and testaments, the granting of letters testamentary and of administration, and the repealing of the same. (Note a.)
2. The act of 1827, in amendment of the act of 1825, concerning Courts, transfers to the County Courts all the jurisdiction which the act of 1825 had given to the Probate Courts, and which the act concerning wills and testaments does not seem intended to restrain.
3. It being a well settled rule of law, that the best evidence the nature of the case will admit of must be produced, if it should appear that better evidence might have been brought forward, the circumstance of its being withheld furnishes a suspicion against the party withholding it, that it would have prejudiced his interest if it had been produced.
4. One witness to a will lost or destroyed, is enough to establish the due execution of the will, if he prove that he saw the other witness subscribe it in the testator's presence.
5. The loss or destruction of a record being first proved, its contents may be proved by secondary evidence.
6. A will being lost or destroyed, probate may be granted upon a copy; also, where there is no copy, the contents of the will may be proven and the will established by the subscribing witnesses, or others who have read it. (Note b.)

ERROR to the St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

At the November term of the St. Louis County Court for the year 1833, certain papers were filed in that Court, purporting to be copies of the will, &c., of John

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Mullanphy, deceased. John O'Fallon, the defendant in error, claiming to be the executor of said Mullanphy, offered to prove that the papers above mentioned were a copy of the last will and testament of said deceased; and also offered to prove that the original will and testament was [were] duly executed by said Mullanphy in his life time in pursuance of law; that the said original will and testament was [were] in existence since the death of said Mullanphy; and that it had been since his death either lost or destroyed, and that it cannot be produced; and further offered to prove that the paper produced is a true copy of said original will and testament. To the taking of this proof, and the jurisdiction of the Court in taking probate of such last (508) will and testament in the manner aforesaid, James Clemens and Eliza his wife, Richard Graham and Catharine his wife, William Harney and Mary his wife, which said Eliza, Catharine and Mary are some of the heirs at law of the said Mullanphy, objected; and the County Court sustaining their objection, rejected the evidence offered. From this decision of the County Court, O'Fallon appealed to the Circuit Court, and that Court having reversed the decision of the County Court, Graham, Clemens, Harney, &c., sued out a writ of error to this Court, believing that the proper mode of proceeding in this case is by writ of mandamus from the Circuit Court to the County Court commanding it to admit the proof or show cause; we will, nevertheless, as the cause is before us, and as it is important that a final decision should be had in as short a time as is consistent with a correct administration of justice, take it into consideration. The assignment of errors being general, we will consider only whether the evidence has been properly rejected. The plaintiffs in error contend that the County Court can grant probate only of the original executed by the deceased, and not of a copy. They rely on the 5th, 6th, 8th and 10th sections of the act concerning wills. Those sections all are framed with a view to direct the Courts how to proceed in the proving of wills which may be exhibited in Court. The 8th section provides that in certain cases the Court or its Clerk may issue a commission annexed to a will, and direct it to any Judge or Justice of the Peace, &c., empowering him to take and certify the attestation of the witnesses to such will. The 10th section requires that when any will shall be exhibited to be proved, the Court or Clerk having jurisdiction thereof, shall receive proof thereof, and grant a certificate of probate, &c., whence it is inferred that the statute only intended to confer this jurisdiction on the County Court in cases where the original was produced, see *Revised Code*, pp. 791-2. On the other hand, the counsel for the defendant contend that the act of 1825, concerning Courts, gives to the Probate Courts a general jurisdiction in all cases relative to the probate of last wills and testaments; and that the act concerning wills, does not restrain that jurisdiction, and rely on the 3d section (509) of the same act, (see *Rev Code*, p. 790,) which, they say, shows that the Legislature in passing that act, had in their mind the case of destroyed wills. And they add, that the act of 2d January, 1827, to amend the act to establish Courts of justice, &c., transfers to the County Courts all the power before possessed by the Probate Courts, (see 3d section, p. 19, of the acts of 1826-7.)

The 6th section of the act of 1825 above mentioned, and to which the counsel of the defendant in error refer, gives to the several Courts of Probate exclusive original jurisdiction in all cases relative to the probate of last wills and testaments, the granting of letters testamentary and of administration, and the repealing of the same, &c. The act concerning last wills and testaments seems to have been made, partly with a view to direct the Court of Probate how to proceed in some of its duties. The 8th

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section gives to that Court the power to issue a commission annexed to the will, to certain judicial officers, to take and certify the attestation of such witnesses as may be prevented by sickness from attending, or may reside out of the State, &c. The 10th section directs the Court or Clerk how to proceed, when a will is presented and witnesses are at hand. As the most ingenious and able lawyer would find it a difficult task to foresee every difficulty or doubt that might arise in the discharge of the duties of Probate Courts, the Legislature seems to have contented itself with providing for those cases which appear to have presented the greatest difficulty, and to have left them to seek aid in the common law rules of proceeding, in the discharge of the ordinary duties imposed on them by the 6th section of the act of 1825 above cited.

The act of 1827, in amendment of the last cited act, transfers to the County Courts in terms, all the jurisdiction which the act of 1825 had given to the Probate Courts, and which the act concerning last wills and testaments does not seem intended to restrain. The County Courts then being in possession of exclusive original jurisdiction in all cases relating to the probate of last wills and testaments, and in our opinion unrestrained by any provision in the act concerning last wills and testaments, (510) (see p. 19 of acts of 1827, section 3,) it remains to be seen whether, by the known rules of evidence, the original will being lost, inferior evidence may be received. The statute requires that the last will and testament shall be signed by the testator, or by some person in his presence by his direction, and be attested by two or more competent witnesses subscribing their names in the presence of the testator. The best evidence the nature of the case will admit of must be produced. (*Peake's Eri.*)

If it appears that better evidence might have been brought forward, the very circumstance of its being withheld furnishes a suspicion that it would have prejudiced the party in whose power it is, had he produced it. Thus, if a written contract be in existence and in the custody of the party, no parol testimony can be received of its contents. In some cases, (*Peake's Eri.* 30,) when it has been clearly shown that a record once existed, which has been since destroyed, much inferior evidence of its contents has been admitted. The same author, at page 67, says, "we have seen that even a judgment, when destroyed, may be proved by secondary evidence. This rule applies universally to every species of evidence." The admission of secondary evidence does not dispense with any of the provisions required by the statute to give solemnity to the instrument sought to be established as a last will and testament. After its existence has been proved and its subsequent loss, then it must equally be proved that it was subscribed by the testator, and that the two witnesses each subscribed it in his presence.

One of these witnesses will be enough to establish the due execution of the will if he can prove that he saw the other witness subscribe it in the testator's presence. For the law, which requires the best evidence, does not require all the evidence which might be given, (*Peake* 9.) If then, the contents of so solemn an instrument as a record can be proved by inferior evidence, the loss of the record being first proved, why not the contents of a lost will and testament of a dead man?

The original will itself, even after probate, is evidence of inferior character to the (511) record of a Court. In the absence of authority, we might be content with this demonstration of the soundness of the rule, that would let in inferior evidence to prove the contents of the lost will; but we are not without authority. The following authorities furnished by the counsel for the defendant in error are very appropri-

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ate, *Toller on Ex'ors.*, p. 14. If a will be destroyed during the life time of the testator, it will be substantiated upon satisfactory proof thereof, and of its contents, (see case there cited.)

Again, the same author at page 71 says, if the will be lost, and two witnesses superior to all exception, who read the will, prove its existence after his death, remember its contents and depose to its tenor, are sufficient to establish it, so where the testator had delivered his will to a friend to keep for him, and four years afterwards died, when the will was found gnawn to pieces by rats, and in part illegible, on proof of the substance of the will by joining the pieces, and the memory of witnesses, the probate was granted. In the case before the Court, much better evidence of the contents of the will was offered than was admitted in the cases above cited. It was a copy of the will of Mullanphy. The memory of man is weak; whereas, the copy is as unchangeable as the original. The Kentucky books also furnish us authorities, of which one only will be produced. "In the case of Happy's will, 4 Bibb. 553, it was decided that probate may be granted of a copy of a will when the original cannot be produced. The Judge who delivered the opinion (Owsley) says it is objected that probate cannot be granted by the County Court on a copy; but that the only appropriate remedy is by bill in equity. We are unable to perceive any force in this objection. The case of a lost will is no where excepted in the statute from the jurisdiction given to the County Courts in testamentary matters; and, upon principle, we do not suppose such a case should form an exception. In deciding (continues the Kentucky case) whether probate ought or ought not to be granted, the County Court, it is true, ought to require the original will to be produced, if it is to be had; (512) not however because it is necessary to give them jurisdiction of the matter, but in obedience to the law requiring the best evidence the nature of the case is susceptible of; but if the original is not to be had, then a copy constitutes the best evidence in the power of the party, and upon its production, under the influence of the same rule, the Court ought to proceed either to grant or refuse probate." It cannot have escaped the most superficial observer, that there is a very remarkable resemblance between the case of Happy's will and that of Mullanphy's now before us; so strong indeed is this resemblance, that the Court of Appeals in Kentucky, in deciding the case of Happy's will, may be said virtually to have decided that of Mullanphy's. And that Court was so far from thinking the case a difficult one, that it appears to have been surprised that any doubt concerning the jurisdiction of the County Court should have arisen. We cannot but concur with them in opinion, (see 4 Monroe 422 to the same purpose.) The judgment of the Circuit Court is, therefore, affirmed.

- (a.) See *Jackson v. Jackson*, 4 Mo. R., p. 211.
(b.) See *Graham et al v. O'Fallon*, 4 Mo. R., p. 338.

LINDELL v. WASH.

1. The act of January, 1831, entitled "An act in addition to an act to regulate executions," is an additional act to the general execution law of Feb. 1825, and not to that of Dec. 30th, 1824, which was intended only to regulate proceedings against corporations.
2. The law regulating corporations does not intend that the form of the writ of execution shall run against the "body," there being none in that case to take in execution, but only that it shall run against the lands, goods, effects, &c.

ERROR to St. Louis Circuit Court.

Judge WASH being a party, did not sit in this case.

M'GIRK, C. J., delivered the opinion of the Court.

In the year 1825, Jesse G. Lindell, in pursuance of the act incorporating the Pres. (513) ident, Directors and Company of the Bank of Missouri, made a motion against the Bank to have a judgment rendered against them, for the amount of certain notes of theirs which he held, as also for the amount of five per centum per month till paid. The Court rendered the judgment against the Bank. In 1828, an execution issued on the judgment, on which the Sheriff made a portion of the debt. On the 16th of September, 1831, Lindell issued another execution against the Bank, on which the Sheriff returned that he found no goods nor lands, and that he had, by the plaintiff's direction, summoned R. Wash to appear and answer interrogatories, &c. Wash appeared in Court and moved to be discharged, and to quash the proceedings under the execution so far as regarded him, which motion the Court sustained, and this is assigned for error in this Court. By 4th section of an act entitled an act to regulate proceedings against corporations, passed Dec. 30, 1824, it is enacted that the first process upon any judgment against any private corporation, shall be a *fieri facias*, which the Sheriff shall levy on the lands and goods of the corporation, as in other cases. The 5th section provides "that in case the Sheriff shall return on such writ that no goods and chattels, lands and tenements, can be found, it shall be the duty of the Clerk of the Court, on the application of the plaintiff or his attorney, to issue a writ of attachment against the rights, credits and effects of such corporation, reciting the judgment, execution and return, and directed to the Sheriff, who shall execute the same by summoning, as garnishee, any person having any moneys or effects belonging to such corporation, and any debtor to such corporation who may be found within his county, to appear before the Court at the return of the writ, and then and there answer, &c., and the proceedings shall be the same as in other cases of garnishment. In January, 1831, the Legislature passed an act entitled "An act in addition to the act to regulate executions." By the first section of which they declare, that any judgment creditor having the right to execution, may sue out a writ of execution in the form prescribed by law, or at his option may have a writ of *fieri facias* against (514) the lands, goods, &c., of the debtor, and on such writ it shall not be lawful to take the body of the defendant. The second section provides "that when any *fieri*

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facias shall be issued on any judgment of any Court of Record in this State, and put into the hands of the Sheriff for collection, if no sufficient property can be found in the county whereon to levy the amount due on such execution, it shall be the duty of the Sheriff to summon in writing, as garnishee, all such debtors of the defendant in the execution as the plaintiff, his attorney or agent, shall direct, to appear in Court at the return day of the writ of *fieri facias*, to answer on oath, &c.; and the like proceedings shall be had as in cases of other garnishees in attachment, &c. The 3d section provides the same proceeding shall be had in cases before a Justice of the Peace." The question made is, does this last act embrace cases where a corporation is a defendant in the execution. On the part of Wash's counsel it is argued, that it was not the intention of the Legislature to extend the provisions of this last act to cases of corporations, because in such cases the act of 1824 had already made a provision nearly similar to the provision in this act. The general execution act to which this act refers, was passed February, 21st, 1825, about five or six weeks after the act respecting corporations. The execution law of 1825 prescribed the form of the writ of execution—made the execution run against goods, lands, and the body of the debtor, all in the same writ. This regulation was clearly not intended so far as regards the form to apply to corporations, there [being] in that case being no body to take in execution, nor was it necessary in this act to make any provision on that subject, as the same had already been amply provided for by the act respecting corporations.

The act of 1831 is clearly in addition to the general execution law of Feb., 1825, and not of that of December. The title of the act declares it to be so, and the language carries out the design. In December the Legislature took up the subject of executions, and as they had no individual body to be taken in execution, they provided a *fieri facias*, which was a very sensible thing; and inasmuch as the general attachment law did not apply to them, and because sometimes their debts are not to be got at, the corporators themselves being often the principal debtors, and having generally the most knowledge of the effects, they gave this attachment on the experiment being made first with a *fieri facias*; this no doubt was deemed by them to be ample for the purpose of enforcing the payment of debts due by corporations. To apply the act of 1831 to corporations, would in fact give the creditor but little additional benefit; all that he gains on the one hand by its provisions would be, that he need not wait for the return of the execution before he can have garnishees summoned; but on the other hand, he would lose the benefit of attaching the effects, but could only attach the debts. There can be no good reason assigned why the Legislature did not extend this latter act to effects as well as debts; the fact that they did not do so, shows that they did not suppose they were amending the corporation act; and what shows more clearly the Legislature did not intend to add any thing to the execution law against corporations is, that by the first section of the amendatory act they give the plaintiff an option which he never had before, to take his execution against goods, lands, and body, all in one writ, or to have it against the lands and goods only. Now if this law extends to corporations as to the summons on execution, it will also repeal so much of the corporation act as only gave the *fieri facias*, but gives the execution against the body too; this it will do by reason of the generality of the expressions used in the first act.

Not believing the Legislature intended to do so, we say the general words in the first section are not to go beyond the object of the Legislature, and so we say with

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regard to the general words used in the second section ; they might be applied by reason of their generality to the case of the corporation, but there is no necessity to do it. Something is also gained by the title of the act ; its title purports to add to the act regulating executions. The act does add to that act things material and important. This shows to what point the Legislature intended to direct their legislation. The judgment of the Circuit Court is affirmed, &c.

(516) PERRY, THE EXECUTORS OF PERRY AND BRYAN, v. CRAIG.

1. In case of a pledge, when no time is mentioned, the pledgor has his lifetime to redeem in, on the condition that the pawnee may hasten the time by request; and should the pawnor, after request, not redeem in reasonable time, the pawnee may sell the pledge and get his money.
2. In contracts of mortgages, and of all other kinds, to ascertain what the parties mean, we must in some instances look not only at the words but to the subject matter of the contract, and in cases of mortgages of things of a variable price, where no time is mentioned, the mortgagor ought to redeem while the article is at a fair value. (Note a.)
3. The time fixed by law, in which a right must be pursued, furnishes also a bar in equity, when the party seeks that Court for redress.
4. Negligence and lapse of time will form objections to a complainant's right in all cases; no matter whether founded on a mortgage, equity of redemption, or other matters of equity.
5. Poverty cannot be allowed as an excuse for a party's not bringing suit in time.

APPEAL from Washington Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

In the year 1827, Craig brought a bill in Chancery against James F. Perry and wife in the Circuit Court of Washington county. The substance of the bill is, that in the year 1810, some time in the spring of the year, he had occasion to borrow the sum of five hundred dollars, and that he applied to James Bryan, who then lived in the now limits of the county of Washington, to lend him the same ; that Craig then lived in Ste. Genevieve county, at the Mississippi salt works ; that Bryan agreed to lend him the money, and did do so on the 10th of July of the same year, and that Craig in consideration of said loan, and to secure the re-payment to Bryan, executed to him a deed of mortgage on the same day for a certain negro woman named Sarah, and her child, which negroes with their increase were to be returned to Craig by

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Bryan, so soon thereafter as Craig should repay the money with interest, and that the slaves had long been and then were in possession of Craig, and that he then delivered the same to Bryan for the purpose of securing the payment of the money, and that (517) he then executed to Bryan the following mortgage under his seal: "Know all men by these presents, that I, George Craig, for and in consideration of the sum of five hundred dollars lawful money, to me in hand paid by James Bryan, have bargained, sold and delivered, and by these presents doth bargain, sell and deliver unto the said Bryan, one negro woman slave, and child one year old, the woman about 27 years, named Sarah, and I hereby warrant and defend the title and claim to the said negro woman, and that she is healthy and sound, upon these conditions, that the said negro woman may be redeemed by the said Craig according to the tenor and effect of his contract entered into with said Bryan. Given under my hand and seal this 10th day of July, 1810, (signed) George Craig. [Seal.] The bill then states that Craig in the spring of the year 1810, when he borrowed the money of Bryan, was engaged in the county of Ste. Genevieve, in which Bryan then lived, in making and manufacturing salt, and that Bryan was then engaged in merchandizing in said county, at a place now in Washington county, and that Bryan expressly agreed with Craig to take salt to the amount of said loan at the rate of two dollars per bushel, from time to time, as Craig could make it, saying he could or would rather have the salt than the money, as he could sell it at a profit. The bill then states this is the agreement alluded to in the condition of the deed of sale and mortgage; Craig says about that time he actually, in pursuance of the agreement, did sell and deliver to Bryan one hundred bushels of salt, at two dollars per bushel, and also, after the date of the deed of mortgage, he delivered one hundred bushels more, at the request of Bryan, on the agreement. Craig mended his bill, and made the executors of Samuel Perry and Timothy M. Bryan parties. By this amended bill, he states the agreement and mortgage again, and somewhat different from the first statement. He states, that in the spring of the year 1810, one Jenkins had a judgment and execution against him for six or seven hundred dollars, and that to pay off the same, he applied to James Bryan for the money in the month of May, 1810; that Bryan lent him five hundred dollars, and that to secure the re-payment, he made the mortgage above referred to, and Craig (518) says, at the same time it was agreed between him and Bryan, that inasmuch as Craig was then in the salt making business, and Bryan was merchandizing, that whatever quantity of salt Bryan should send for before or after the five hundred dollars should be advanced, the same should go to the credit of Craig toward redeeming the slaves. That shortly after the arrangement, and before the money was advanced, Bryan sent and got eighty bushels of salt, which salt was to be valued at the market price, and that salt was worth two dollars per bushel; Craig then charges that the money was a loan, and that the negroes were mortgaged to secure the re-payment, and that it was expressly understood and agreed that he might redeem the slaves at any time; the bill further charges the delivery of other quantities of salt.

The bill then goes on to state, that Sarah has had large increase, some four or five children, and that they are now all of great value, and that Bryan has had possession of the said slaves ever since the mortgage was made, till his death in 1820; that the widow of said Bryan continued on in possession of the same till her intermarriage with James F. Perry in 1825; that he then took possession of the slaves, and still continues in possession of the same, and refuses to deliver the same to him although he has offered to pay on said mortgage whatever may be due, and that he is still ready

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to pay whatever may be due ; he also states that the labor of the slaves is of great value, &c. J. F. Perry and wife answer : the wife knows nothing of the affair ; found the slaves in her husband's possession ; at his death she continued the possession ; her husband died making no will, and that there never has been any administrator. Perry says, he found the slaves in possession of the widow Bryan when he married ; that he has found the mortgage mentioned by Craig, and makes exhibit of it ; that in the year 1826, he and Samuel Perry purchased the slaves of Timothy M. Bryan, of Philadelphia, for the sum of twelve hundred dollars, which sum was paid to said Bryan in cash, and that he never had any notice of Craig's claim till some time after his purchase, and that the first time he ever (519) had any notice of the same, was from Craig, who a short time before the commencement of the suit, called on him and stated his claim to the slaves, and offered to enter into an account in relation to them, which he the defendant rejected ; but that Craig, at that time, neither tendered money to him on account of the contract with J. Bryan, nor did he offer any thing else in discharge of the mortgage, nor was Samuel Perry present ; that he found the mortgage among the papers of J. Bryan after much search, having never seen it before ; insists that himself and S. Perry are purchasers for a valuable consideration without notice, and also insists on the statute of frauds, and on the statute of limitations. J. F. Perry is appointed guardian for the infant children of J. Bryan, who are made parties ; their answer is, that they have no knowledge of the matter.

Samuel Perry says he was acquainted with Craig and Bryan before 1810, and since ; that he first saw the negro woman in 1810, in possession of Bryan at his house at Hazle run, in Ste. Genevieve county ; that Craig and Bryan both lived in the same neighborhood ; that he knew the slaves to have continued in possession of Bryan and his family up till 1826, when he bought of T. M. Bryan ; that he was often, in the course of business, in the company of George Craig, and that he never heard from Craig or any other person, that Craig had any claim on the negroes ; that in 1823 or 24, T. M. Bryan, of Philadelphia, proposed to sell the said woman and her increase to him, stating that they belonged to him, and that he had purchased them of James Bryan in his lifetime to secure a debt for goods and money borrowed of him, T. M. Bryan, some years before ; that he, S. Perry, then declined purchasing, but afterwards concluded to purchase jointly with J. F. Perry, and accordingly, in 1826, being in Philadelphia, did purchase the said slaves for himself and J. F. Perry for the sum of \$1250, which he paid to T. M. Bryan in cash ; and that himself and J. F. Perry, his partner, have kept and enjoyed the slaves ever since. The bill charges James Bryan was insolvent at and before his death ; as to this, Samuel (520) Perry says he does not know Bryan was insolvent, but thinks if he had lived a few years, he would have paid all his debts, &c., and that he never so much as heard of Craig's claim till he was sued by Craig ; that he denies all confederacy, combination, &c. T. M. Bryan answers and says, that as to any bargain or mortgage between Craig and James Bryan, and as to any bargain relating to salt, he is entirely ignorant, and further answering says, that James Bryan was indebted to his father, Guy Bryan, in 1812, in the sum of upwards of \$2000 for money advanced to him by said Guy of Philadelphia, that in consideration of this debt, and in part payment thereof, James Bryan made a bill of sale of the slaves to him, for the sum of \$1250 ; he then sets out various particulars relating to the debts, and says that when the slaves were sold to Perrys, the money was passed to the credit of Guy Bryan ;

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he insists that he was a purchaser *bona fide* for a full and valuable consideration without any notice of Craig's claim, and that he did not hear of the same till he saw Craig's bill; and farther, he says in 1823, he was in Missouri, and finding the widow of James Bryan in need of help, he left the slaves with her; took a written promise of her to deliver them, &c.; and that in 1826, finding the widow had married and did not any longer need such assistance, on the application of the Perrys, he sold the slaves to them for \$1250 as aforesaid. The Perrys also insist that they were *bona fide* purchasers without notice. All the defendants insist on the statute of limitations and the lapse of time; several exhibits were made of the deed of mortgage, bills of sale, &c. Replications were put into the answers. S. Perry died, and his executors are made parties. On the trial the complainant proved by Robert Hinckston, in substance, as follows: that witness once had a conversation with James Bryan, from which conversation he understood from Bryan, that a negro woman and child, the woman named Sarah, were put into his hands as a pledge for a sum of money advanced by Bryan to Craig, for which Bryan was to take salt in place of the money loaned to Craig, which was about \$600; he thinks in the year 1810 or 1811, some time after the before mentioned conversation with Bryan, witness (521) asked Bryan if Craig was likely to get back or redeem the negroes, Bryan replied as well as witness can recollect, that Craig had let him have some salt towards redeeming them, but the quantity the witness cannot say at this time; that the first conversation was after Craig had let Bryan have the negroes; that at the time Craig borrowed the money of Bryan, he was engaged at the Mississippi saline, in raising water for the salt works. Craig's wages were one thousand dollars payable in salt, and that Craig was so employed upwards of a year. The general price of salt at the works was, in 1810, two dollars per bushel; that Bryan kept store at the time; that Bryan informed the witness that the negroes were put into his hands till the money or salt was paid up. Salt afterwards fell in price, say the same season, or afterwards. Witness states that about the time, and after one Jenkins obtained judgment against Craig, he became embarrassed; says the slave Sarah was valuable and is the same sued for. In 1817, Craig removed from that portion of country to the upper country; that Jenkins held Craig as principal, and the witness as surety, in the case where the judgment was, and that witness showed the Sheriff the slave to levy on; believes that Craig in 1810 or 1811, might have paid four or five hundred dollars being then in the employ of Bird, but without that was poor; says on the question being put, that Craig made the mortgage to Bryan in one of the years 1810, 1811, or 1812. On the question being put, witness says he did not understand from Craig and Bryan, that if the money or the salt was not paid, the slaves were to belong to Bryan; says his recollection and belief is, that both Bryan and Craig told him, if the money or salt was not paid, then Bryan was to keep the slaves. There is testimony that, in May, Bryan got of Craig eighty bushels of salt. One William Hinckson testifies, that in the year 1810, on the 11th of November, he was at the store of Bryan at Hazle run, Craig and Bryan were both in the house, saw the clerk of Bryan counting money in the presence of Craig, knows not who got the money. (522) Craig also proved a letter of Bryan about April, 1811, wherein he tells Craig he wants no more salt then. This all the testimony material to be noted. The Circuit Court made a decree, that Craig be let in to redeem the slaves, and decreed an account for hire, and that the slaves be delivered over to Craig, as the wages had overpaid the mortgage money; found a balance as against J. F. Perry and the exec-

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utors of S. Perry, &c. To reverse this, the defendants appeal to this Court. The decree is attacked, mainly on the ground, that there is no equity in the bill, and that the plaintiff is barred by the statute of limitations and lapse of time; that Perrys are fair purchasers without notice, &c. It is insisted on the part of Craig, by Mr. Gamble, that in this case, as no time was mentioned when the money or salt was to be paid, Craig has his lifetime to do it in, as in the case where one pledges jewels and no time is mentioned for redeeming, the pledgor or the pawnor has his lifetime to redeem in. On the other side, Mr. Bates insists that the time should be reasonable, and whether the time is reasonable or not, depends on the nature of the thing mortgaged. We believe this doctrine will furnish the best rule.

Where no time is mentioned in case of a pledge, in case jewels are pledged, then the pledgor has his lifetime to redeem in, on this condition, that the pawnee may hasten the time by request, and if the pawnor, after request, does not redeem in reasonable time thereafter, the pawnee may sell the pledge and so get his money. In all contracts or mortgages, and of all other kinds, the great point is, what the parties really mean by the agreement.

To ascertain in some instances what was meant, we must not only look at the words, but we must look to the subject of the contract, as if there be a mortgage of a crop of corn in the field, or of one hundred cords of wood in the open air without shelter, and no time is mentioned for redemption, can any one in such case suppose either party expected the time of redemption would continue for the lifetime of the mortgagor? And again, when the thing in which the redemption is to be made, is of a variable price; thus, when the redemption is to be made in bank stock and at a (523) certain value, and no time is mentioned, the mortgagor ought to redeem while the stock is at a fair value; so where the redemption is to be made in salt at a price fixed, or any other article which at one time may be marketable and at another time not so. If this reasoning be correct, Craig's claim to redeem at any time in salt is so unreasonable, that we can scarcely believe it to be true that it was expected by him or Bryan, that Craig had his lifetime to redeem in. Craig mortgaged to Bryan a young negro woman with her first child. It must have been foreseen by both, that if Craig might have twenty or even thirty years, that to give him his lifetime to redeem in, would throw on Bryan an enormous burden, a burden to raise a family of slaves for Craig at his expense and risk, without any advantage equal to the undertaking. It would turn him into a slave hirer, when it may be he would not at all be willing to be a hirer to the extent he is made such in this case. If the question had been propounded to either at the time of making the mortgage, do you mean this, the answer would have been, no. But in answer to this, it is said Bryan might have hastened by demanding redemption; suppose he had done so, and Craig had still neglected, what could Bryan do? He could not have foreclosed the equity of redemption under the statute, as will be seen by the case of O'Fallon *v.* Elliott, administrator of Hanly, decided by this Court. There the Court decide the statute would not apply, and they know of no legal remedy to foreclose the equity of redemption of a chattel at common law. Whether the equity of redemption could be foreclosed in Chancery, or whether, when the time is passed, the estate in a chattel is indefeasible, has not yet been settled. In New York the doctrine is, redemption may be allowed. In this State there has been no decision, and many have doubted. But suppose Craig could redeem after the time for redeeming had elapsed; the question is, what was that time? We think enough is shown to satisfy any one, that

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Craig was to pay the money or salt within a year, or at all events within two years at most. Craig says he was then engaged in manufacturing salt, and as he had the (524) article, and as it suited Bryan to sell salt at his store, and as he could sell the same on a profit, he agreed with Craig to take salt, from time to time, in lieu of the money, this shows most conclusively what the parties meant as to time. Hinkston says Craig was hired by the year for one thousand dollars per year, payable in salt. The witness further says, Craig remained at that employ one or at most only two years. The bargain was, that Craig was to pay salt and Bryan to receive from time to time. The plain and every day meaning of this is, that as fast as Bryan sold out what he might have on hand, he should call on Craig for more, and Craig was to pay it. It is our opinion that the parties both meant the time for redemption in salt, and in money too, was not to extend beyond the necessary time to sell this salt. Bryan had a store, we know nothing of the largeness of the demand for salt there, say the parties contemplated one year, or two years, or three years, as the utmost time when all this salt was to be paid; then, that is the time when the mortgage became forfeited. The circumstance that in 1811, Bryan said he did not want any more salt then, has no effect as to the real time of payment intended at the time beginning. We cannot expect that Craig believed or intended he would be always engaged in making salt during his life, nor that Bryan really intended or expected to be for the whole of Craig's life engaged in salt selling. The utmost time which was contemplated by the parties was not beyond three years. In July, 1814, this estate in the slaves became absolute at law in Bryan. As to the point, whether there is equity in the bill or not, it is not necessary for us to discuss that, because we think as to whatever equity there may once have been, the plaintiff's claim is barred by negligence and lapse of time.

Courts of Equity have, in England, and in the United States too, allowed the time fixed by law, in which a right must be pursued, to furnish a bar in equity when the party comes there for redress. Thus, in ejectment, the right of bringing that action in England was twenty years; so a claim in equity regarding that land, must be prosecuted in equity within twenty years. The first case cited by the appellant, shows (525) what is the rule with regard to mortgages of land, i. e., *Cases abridged*, 313; there the rule is laid down to be, that equity would not relieve mortgagors after twenty years, for the statute of limitations held it reasonable to limit the time of one's entry to that number of years; and it is farther said, though there is no time limited for redemption of mortgages, yet Courts of Equity discourage the stirring old and dormant claims. In *1 Powel on Mortgages* 360-1, the rule is laid down to be, that twenty year's possession on the part of the mortgagee, and no disability on the part of the mortgagor, is *prima facie* a bar to the right of redemption. In the case of Demarest et ux v. Wynkoop, 3 John. c. r. 129, it was holden that twenty year's possession by a mortgagee, is a bar to all equity of redemption. In 6 Peters' Reports 61, in the case of Miller's heirs et al v. McLuttyre, the Supreme Court of the United States decide, that the Court in Kentucky and elsewhere, by analogy, apply the statute of limitations in chancery to bar an equitable right when at law it would be barred. The statute operates when the titles are adverse in their origin, and no reason is perceived why this rule should not be applied in equity. By these authorities it is clear enough that the rule in equity is that when the mortgagee or person to whom the land or chattel was mortgaged has had the thing so long that no action at law could be brought against him by reason that the statute of limitations would bar

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his right, there equity will not disturb that possession and will not allow the party to redeem, we see no reason why this rule should not be applied to Craig's claim.

It is a rule as old as Courts of Equity, that negligence and lapse of time will form objections to a complainant's right in all cases; no matter whether founded on a mortgage, equity of redemption, or other matters of equity. On the part of Craig, we are referred to several authorities to controvert the doctrine attempted to be raised against him, 1 *Wash. R.* 17, *Ross v. Norvell*, and a late decision of the Court of Appeal of Kentucky, 7 *J. ch. R.* 113, 125; 3 *do.* 216. The case of *Ross v. Norvell*, 1 *Wash. R.*, appears to be a case of this sort. The complainant on the 5th April, 1779, (526) filed his bill praying to redeem certain negroes which had been mortgaged in 1765, to secure the payment of a debt due by him; the slaves were conveyed by an absolute bill of sale in June 1765, with a warranty, and a receipt for the consideration stated in the deed, was written on the back of the deed; the bill says, the deed though absolute on the face, was only a security, and that it was verbally agreed that the plaintiff might redeem at any time. The answer insists the sale was absolute, and was intended as a satisfaction of a prior debt; as to the evidence there was some contrariety. The Chancellor decreed the redemption. It was, among other things, objected, on the hearing of an appeal taken, that time, in this case, formed a bar to the redemption. The Court say in the case, that the time allowed for bringing an action of detinue in that case was not barred by the statute; they then go into a computation to show how much time had elapsed. The Court in the case are of opinion, that the ground on which the bar in equity arises, is not justly put on the analogy to the statute of limitations; but on the presumption that arises from time and negligence; this is said by way of argument, as the Court had already decided the time for bringing the action of detinue had not expired, and they deny that the statute of limitations furnishes the true rule. The Supreme Court of the U. S. in the case of *Miller's heirs et al v. McLutyre et al*, 6 *Peters' Reports* 61, entertain a different opinion. The case of *Kane v. Bloodgood*, 1 *J. ch. R.* 111, is cited to show that technical trust created by equity, are not within the statute of limitations. The cases put by Chancellor Kent are cases which, he says, cannot be sustained by modern decisions. One case is, where money has been received in such manner that an account would be necessary; in that case, he who receives the money is a trustee in equity for the person whose money has been received. Chancellor Kent says, according to this, every person who receives money to another use, is put out of the protection of the statute, if the party elects to sue him in chancery instead of suing at law; the case goes on to say in page 113, the first case that gave any thing like precision to the definition (527) of a trust not within the statute of limitations, was that of *Lackey v. Lackey*, (*Rec. in Chan.* 518,) that was an account for the profits of an estate received while the plaintiff was an infant, and a bill was not filed until six years after he came of age. The Lord Chancellor Macclesfield was clearly of opinion, "that when one receives the profits of an infant's estate, and six years after coming of age, he brings a bill for an account, the statute of limitations was a bar to such suit, as it would be to an action of account at common law. The case then goes on to lay down the rule to be, that whenever the party would be barred at law if he brought his action there for the same thing for which he sues in equity, he is also barred in chancery. 3 *Johnson Chan.* 216, has been cited to show the statute cannot apply in this case; there we find it said by Chancellor Kent, that no time will bar where there is a direct trust, as between the trustee and *cestui que trust*; and accordingly he cites a case,

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Cholmondeley v. Clinton, 2 *Merivale* 360, where it was decided that so long as a trust subsists, the right of the *cestui que trust* is not affected by the statute of limitations. The case then goes on to put the cases of executors and administrators, as cases furnishing trusts not barred by the statute; as where the next of kin called on the administrator to pay the surplus, the administrator could not avail himself of lapse of time, (317 same case.) Another case has been cited from a manuscript report decided lately by the Court of Appeals of Kentucky; without stopping to examine the reasons of that case, we will only say that so far as that case is contrary to the cases cited above for the appellants, we are not prepared to let it overrule the many settled and established authorities laid before us. As to the case in 1 *Washington*, we have already shewn that the case was decided on the ground the time had not run out. Upon this view of the authorities on both sides, we are clearly of opinion that Craig's claim is barred by the statute of limitations and lapse of time. It is of the utmost importance to the property, peace and welfare of the people that such a limitation should exist in chancery as well as at law. Chancery Courts have long ago, as we (528) think, established this rule, and we are not at liberty, if we would, to disregard it now. Craig, however, to escape from the effects of this rule, has alledged that he was poor and unable to raise the money to pay the balance due within the time he would have had before his claim was barred. This argument so far as respects his poverty probably was true, but so far as respects that being the reason why he did not redeem it, is a suspicious argument.

The fact of poverty has never yet been allowed as an excuse why a party should not sue in time. Let us look into the truth of this argument; we have said the statute began to run on Craig in 1814, July 10th. Detinue then as an action, had no limitation; in 1818 it was limited to five years; then at any rate, if not before, the statute began to run on Craig; in 1823 the time was out. In 1823, it is believed by us that from the testimony as to the age and value of Dick, the child mortgaged, he was worth the balance of the money due in 1822. When the time was about to close on Craig forever, Dick was 12 or 13 years of age. Craig might then have sold him, or him and another child, to pay the balance of the mortgage, and have redeemed the balance of the slaves. He seems never to have thought of this resource which was most obvious, especially to a man whose other resources were said to be straitened. The circumstance that he made no attempt to do so, and also the circumstance that in 1817, he left that part of the country entirely, furnishes strong arguments in favor of the usefulness of the statute of limitations which proceeds on the ground that within the time fixed for bringing suits, a case may well be supposed to be settled and the witnesses dead, who could testify as to the settlement. Craig stands in this condition; his equity of redemption is supposed to have been extinguished if he ever had any, and the length of time is supposed to have swept off the witnesses who could have proved it, and he cannot now be permitted to disturb the present possessors of the property. Time began to run against Craig in 1818 at all events, and it is a rule that when time begins to run on a man's right, it sweeps on regardless of the death of the (529) claimant or the person against whom the claim is. According to this view of the subject, the decree of the Circuit Court must be reversed, &c.

(a.) See *Desloge et al v. Ranger's Ex.*, 7 Mo. R., p. 327.

SALLE DIT LAJOYE v. PRIMM.

1. To set up the right of prescription, between private individuals, on a possession short of thirty years, the title must commence in a fair and formal manner.
2. Prescription requires a continued, uninterrupted, peaceable, public and unequivocal possession by one who is master, or who has good reason to think himself so, and it cannot be allowed against the crown.
3. Before the change of government, no one was authorized to be owner of any land in this State, without the grant or permission of the proper officer.
4. The object of the act of Congress of 1812, confirming lots, &c., was to confirm to the inhabitants of the towns and villages therein enumerated, the lots occupied or possessed by them prior to Dec., 1803.
5. An estoppel must be certain to every intent, and precise and clear.
6. There can be no estoppel, if the matter alledged be not material.
7. A person is always estopped by his own deed, and will not be allowed to aver any thing in contradiction of what he has once solemnly and deliberately avowed.
8. Absence beyond the seas for seven years, without being heard from, raises the presumption of death.

ERROR to St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of ejectment commenced in the Circuit Court by the plaintiff in error against the defendant in error, to recover the undivided moiety of a lot of ground in the City of Louis, containing 75 feet, French measure, by 120 feet, being the east half of a lot 120 by 150 feet, French measure, which last named lot is the northwest quarter of block No. 57, as designated on the plat of the city of St. Louis. The defendant had a verdict and judgment, to reverse which judgment the plaintiff now prosecutes his writ of error in this Court. The evidence is all preserved by a (530) bill of exceptions, from which it appears that Jean Salle dit Lajoye, the father of the plaintiff, about the year 1769, built a stone house on the northwest corner of the square or block No. 57; and had a garden, and enclosed the west half of the square, the northeast portion of which he purchased from one Bon Varlet who had settled upon it a few years before, and which includes the land in dispute; and continued in possession of the same until he left this country for France in 1792 or '93; at which time he removed and settled in Bordeaux, where he continued to live up to the 29th of December, 1817. Since which time he has not been heard from. About the year 1770, Jean Salle intermarried with one Marie Rose Panda, by whom he had a son (the present plaintiff) and a daughter (Helene Leroux.) When he removed from St. Louis to Bordeaux, he took his son with him, and left his wife and daughter in possession of his house, who, together with Peter Primm the defendant, and his, Primm's wife, (the daughter of Helene Leroux,) have continued ever since to occupy the northwest quarter of said block or square, the east half of the northwest quarter of which the defendant had possessed exclusively since 1809. Eighteen months or two years after Jean Salle removed to Bordeaux, his son the plaintiff returned, and

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has ever since resided in the country, but not on the lot or square on which his mother and sister lived. Marie Rose, the mother of the plaintiff, died in 1830. From the time the plaintiff returned from France, up to the 29th of Dec., 1817, Jean Salle, the father, had no intercourse with his family. The manner of his removal and the circumstances attending it as detailed in the evidence, as also a letter received from him of the date of the 29th Dec., 1817, shows clearly that when he removed to Bordeaux in 1792, he intended to abandon his family and the country, and no intention could have been more fully acted out or persevered in. It was proved that Marie Rose, the mother of the plaintiff, died in 1830, at the advanced age of 104 years, and the witnesses state Jean Salle, the father was, or appeared to be, as old as his wife; and not having been heard from since 1817, and being then about ninety years old, (531) the plaintiff relies upon the presumption of his death, and claims as heir to his father the undivided moiety of the lot sued for; insisting, first, that the title of Jean Salle, his father, was a good and perfect one, according to the law of prescription, in force whilst the country belonged to Spain; or else, that the act of Congress of the 13th of June, 1812, operated a confirmation to his father by virtue of his prior possession of the lot; and again, the plaintiff insists, that if it be held that Jean Salle had no title by prescription, and that he had abandoned his possession, and could take nothing by the act of Congress of 1812; then he claims as heir of his mother, the moiety of whatever she was entitled to claim by virtue of said act. The defendant gave in evidence a deed of conveyance dated Oct. 21st, 1816, from the plaintiff and Marie Rose, his mother, and Helene Leroux, his sister, conveying to the defendant the west or corner half of the lot of 120 by 150 feet, above referred to; in which deed is the following clause: The grantors "sell unto him, the said Peter Primm, his heirs and assigns forever, a certain town lot or parcel of ground, lying and being situate in the town of St. Louis aforesaid, containing one hundred and twenty feet fronting on Third Main street, by seventy-five on the rear, French measure, bounded westwardly by the aforesaid Third Main street, which separates the said lot from the lot of Rufus Easton, northwardly by a cross street which separates it from the lot of Paul Guitard, eastwardly by lot of Peter Primm, and on which he now lives, and southwardly by lot on which Elijah Beebe now lives;" and insists first that the plaintiff's father had no title by prescription, and that the act of Congress of 1812, operated a confirmation of the title to the mother, Marie Rose, and her son-in-law, Benjamin Leroux, who, with his wife, Helene, jointly possessed the lot within the meaning of the act; and secondly, that the deed from Marie Rose to Peter Primm above referred to, admitted the title of the lot in dispute to be in Peter Primm, and that the plaintiff, as heir of his mother, is estopped from claiming any portion thereof. Upon this state of facts, various instructions were asked on the part of the (532) plaintiff, which were refused, and on the part of the defendant which were given. It is not now our purpose to notice them in detail; but to proceed to the examination of those of them only, on which the parties mainly rely, (i. e.) first, did Jean Salle acquire title by prescription to the lot in question? The right of prescription has been heretofore but little discussed or investigated, and no decision, it is believed, has ever been made upon it in this Court. The doctrine, as it is to be collected from the Partidas, the digest of the civil law prepared for the Territory of Orleans in 1808, and from Febrero, leaves it somewhat doubtful, whether the right of prescription could ever arise as against the King. The principles upon which the right is founded according to *Febrero Lib. III, cap. II, S. 239* are, "first, for the pub-

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lic good, to the end that the dominion of property might not remain for a long time or almost always uncertain. Second, to avoid the innumerable and perpetual suits which might otherwise originate. Third, that the possessors of property might not be always in dread of losing what they had honestly obtained; and fourth, to punish the indolence of those who were tardy in recovering their property; so that they should impute the loss of it to themselves, since the law protects those who watch and not those who sleep."

In order to set up the right, as between private individuals, on a possession short of thirty years, the title must commence in a fair and formal manner. The principal laid down in the civil code, and which is recognized both by the Partidas and Febrero, is, "that a man who becomes possessed of an immoveable estate fairly and honestly, and by virtue of a *just title*, may prescribe for the same after the expiration of ten years, if the true proprietor resides in the Territory, and after twenty years, in case said proprietor resides abroad," see civil code, title prescription, sec. 11, art. 67. This is the authority upon which the counsel for the plaintiff mainly rely, in order to make out their title by prescription. A slight examination will suffice to show, that it has reference to individual claimants, and cannot with any reason be made to apply to the King or Government. The King is never presumed to be absent from his dominions. His Territories are under the command and in the possession of his officers, and he cannot be charged with indolence in not resuming what had never been parted with. In looking a little further to other provisions of the law, it will be still more evident that the one relied on in this case, was not intended to authorize an individual to prescribe against the crown.

Prescription requires a continued, uninterrupted, peaceable, public and unequivocal possession *animo domini*, (i. e.) by one who is master, or who has good reason to think himself so, *Civil Code*, sec. 1, art. 38. And the circumstance of having been in possession by the *permission* or through the indulgence of another, gives no legal possession upon which to prescribe; but the person so obtaining possession, will be esteemed to hold for him who grants the indulgence or permission. Jean Salle, was among the first who settled in this country. When his possession of the lot in question commenced, it was known to all that the King was the proprietor of the soil, and had granted but little of it away to the settlers.

Without a grant or permission to settle, obtained from the proper officer, no one could therefore feel authorized to consider himself *master* of a single foot of land. It was not in this new colony, as it was or might be presumed to be in Spain; that the evidences of title commencing in regular and formal grants, had been lost or destroyed through lapse of time. As between individuals, a title commencing by permission or force or fraud, could not be prescribed for in less than thirty years. Salle's possession, as against the government, cannot be placed upon a more favorable footing; for, though he might have purchased a part of the lot in dispute of Bon Varlet by formal sale, yet in order to build up the title on this purchase, Bon Varlet must have sold in good faith, believing at the time that he was the lawful owner, which it is clear he could not have done; the law being, "that he who alienates and he who receives the thing, must both act in good faith, believing they had a right to do so," (*Partidas Law 18*, p. 386.) It is next insisted on by the counsel for Salle, (and they

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that Salle's possession was continued after he left the country in 1792 or '3, since the law regards the possession of the wife and daughter as his possession, for the purpose of setting up the right of prescription. To this there are two answers, first, J. Salle had openly abandoned his family and the country, without the purpose of ever returning to them, and so stopped thereby the running of the right; and second, the right must be set up by the *actual possessor*, who, as donee, vendee, alienee or heir, may join the prior possession of the donor, vendor, alienor or ancestor, to their own possession, and so make out the time required to set up the right in the particular case. J. Salle had neither the natural possession, as it is termed in the civil law, (which means an actual corporal common law possessio pedis,) nor a civil possession, which is raised by force of law, where the possession, instead of being relinquished or abandoned, is merely committed by the proprietor to his family or agent with the purpose of resuming it again soon, or at a time fixed or appointed. Let us now see if J. Salle could claim any thing by virtue of the act of Congress of 1812, above cited. The express object of that act, was to confirm to the *inhabitants* of the towns and villages therein enumerated, the lots occupied or possessed by them prior to Dec. 1803. The most liberal construction of the act, could not, we apprehend, extend its provisions further than to the legal representatives of the last legal owners or possessors, prior to, and at the period referred to in the act. J. Salle was not only not an inhabitant at the passage of the act, but he had ceased to be an inhabitant long before the period referred to. It would be too unreasonable to suppose that where different persons at different periods had succeeded to the possession of the same lot, that the act intended to confirm the title to each possessor, or that where the first possessor had abandoned or transferred his possession, the act intended, (535) ed, nevertheless, to confirm the title to him, upon the maxim invoked by the plaintiff's counsel, "that the prior in possession is the better in right." It is not perceived that any principle of reason, justice or policy, could have moved the Congress of the United States to enact such a provision. The great object of the act was to quiet the villagers in their titles to property (so far as the government was concerned) which had been acquired, in many instances, by possession merely, under an express or implied permission to settle, and which had passed from hand to hand without any formal conveyance. In such cases, possession was the only thing to which they could look, and taking it for granted that those who were found in possession at the time the country was ceded, or who had been last in possession prior thereto, were the rightful owners, the confirmation was intended for their benefit. Marie Rose, with her son-in-law, Benjamin Leroux, (the husband of Helene,) had remained in possession of the lot from the time J. Salle left St. Louis in 1792 or '3, up to the period fixed in the act of 1812; and they were the persons to whom the confirmation enured. The right of the plaintiff to recover in this action might have been readily disposed of so far as he claims title through his father, without having entered into the consideration of the doctrines of prescription; since, from the record, it does not appear that J. Salle is dead, and the plaintiff could not claim as heir whilst his father lives. The questions arising fairly, however, and being considered essential to the final adjudication between the parties, it was thought best to notice them. The next question to be considered is, what or the plaintiff can claim as heir

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ators of S. Perry, &c. To reverse this, the defendants appeal to this Court. The decree is attacked, mainly on the ground, that there is no equity in the bill, and that the plaintiff is barred by the statute of limitations and lapse of time; that Perrys are fair purchasers without notice, &c. It is insisted on the part of Craig, by Mr. Gamble, that in this case, as no time was mentioned when the money or salt was to be paid, Craig has his lifetime to do it in, as in the case where one pledges jewels and no time is mentioned for redeeming, the pledgor or the pawnor has his lifetime to redeem in. On the other side, Mr. Bates insists that the time should be reasonable, and whether the time is reasonable or not, depends on the nature of the thing mortgaged. We believe this doctrine will furnish the best rule.

Where no time is mentioned in case of a pledge, in case jewels are pledged, then the pledgor has his lifetime to redeem in, on this condition, that the pawnee may hasten the time by request, and if the pawnor, after request, does not redeem in reasonable time thereafter, the pawnee may sell the pledge and so get his money. In all contracts or mortgages, and of all other kinds, the great point is, what the parties really mean by the agreement.

To ascertain in some instances what was meant, we must not only look at the words, but we must look to the subject of the contract, as if there be a mortgage of a crop of corn in the field, or of one hundred cords of wood in the open air without shelter, and no time is mentioned for redemption, can any one in such case suppose either party expected the time of redemption would continue for the lifetime of the inmortgagor? And again, when the thing in which the redemption is to be made, is of a variable price; thus, when the redemption is to be made in bank stock and at a (523) certain value, and no time is mentioned, the mortgagor ought to redeem while the stock is at a fair value; so where the redemption is to be made in salt at a price fixed, or any other article which at one time may be marketable and at another time not so. If this reasoning be correct, Craig's claim to redeem at any time in salt is so unreasonable, that we can scarcely believe it to be true that it was expected by him or Bryan, that Craig had his lifetime to redeem in. Craig mortgaged to Bryan a young negro woman with her first child. It must have been foreseen by both, that if Craig might have twenty or even thirty years, that to give him his lifetime to redeem in, would throw on Bryan an enormous burden, a burden to raise a family of slaves for Craig at his expense and risk, without any advantage equal to the undertaking. It would turn him into a slave hirer, when it may be he would not at all be willing to be a hirer to the extent he is made such in this case. If the question had been propounded to either at the time of making the mortgage, do you mean this, the answer would have been, no. But in answer to this, it is said Bryan might have hastened by demanding redemption; suppose he had done so, and Craig had still neglected, what could Bryan do? He could not have foreclosed the equity of redemption under the statute, as will be seen by the case of *O'Fallon v. Elliott*, administrator of Hanly, decided by this Court. There the Court decide the statute would not apply, and they know of no legal remedy to foreclose the equity of redemption of a chattel at common law. Whether the equity of redemption could be foreclosed in Chancery, or whether, when the time is passed, the estate in a chattel is indefeasible, has not yet been settled. In New York the doctrine is, redemption may be allowed. In this State there has been no decision, and many have doubted. But suppose Craig could redeem after the time for redeeming had elapsed; the question is, what was that time? We think enough is shown to satisfy any one, that

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Craig was to pay the money or salt within a year, or at all events within two years at most. Craig says he was then engaged in manufacturing salt, and as he had the (524) article, and as it suited Bryan to sell salt at his store, and as he could sell the same on a profit, he agreed with Craig to take salt, from time to time, in lieu of the money, this shows most conclusively what the parties meant as to time. Hinkston says Craig was hired by the year for one thousand dollars per year, payable in salt. The witness further says, Craig remained at that employ one or at most only two years. The bargain was, that Craig was to pay salt and Bryan to receive from time to time. The plain and every day meaning of this is, that as fast as Bryan sold out what he might have on hand, he should call on Craig for more, and Craig was to pay it. It is our opinion that the parties both meant the time for redemption in salt, and in money too, was not to extend beyond the necessary time to sell this salt. Bryan had a store, we know nothing of the largeness of the demand for salt there, say the parties contemplated one year, or two years, or three years, as the utmost time when all this salt was to be paid; then, that is the time when the mortgage became forfeited. The circumstance that in 1811, Bryan said he did not want any more salt then, has no effect as to the real time of payment intended at the time beginning. We cannot expect that Craig believed or intended he would be always engaged in making salt during his life, nor that Bryan really intended or expected to be for the whole of Craig's life engaged in salt selling. The utmost time which was contemplated by the parties was not beyond three years. In July, 1814, this estate in the slaves became absolute at law in Bryan. As to the point, whether there is equity in the bill or not, it is not necessary for us to discuss that, because we think as to whatever equity there may once have been, the plaintiff's claim is barred by negligence and lapse of time.

Courts of Equity have, in England, and in the United States too, allowed the time fixed by law, in which a right must be pursued, to furnish a bar in equity when the party comes there for redress. Thus, in ejectment, the right of bringing that action in England was twenty years; so a claim in equity regarding that land, must be prosecuted in equity within twenty years. The first case cited by the appellant, shows (525) what is the rule with regard to mortgages of land, i. e., *Cases abridged*, 313; there the rule is laid down to be, that equity would not relieve mortgagors after twenty years, for the statute of limitations held it reasonable to limit the time of one's entry to that number of years; and it is farther said, though there is no time limited for redemption of mortgages, yet Courts of Equity discourage the stirring old and dormant claims. In 1 *Powel on Mortgages* 360-1, the rule is laid down to be, that twenty year's possession on the part of the mortgagee, and no disability on the part of the mortgagor, is *prima facie* a bar to the right of redemption. In the case of Demarest et ux v. Wynkoop, 3 John. c. r. 129, it was holden that twenty year's possession by a mortgagee, is a bar to all equity of redemption. In 6 *Peters' Reports* 61, in the case of Miller's heirs et al v. McIntyre, the Supreme Court of the United States decide, that the Court in Kentucky and elsewhere, by analogy, apply the statute of limitations in chancery to bar an equitable right when at law it would be barred. The statute operates when the titles are adverse in their origin, and no reason is perceived why this rule should not be applied in equity. By these authorities it is clear enough that the rule in equity is that when the mortgagee or person to whom the land or chattel was mortgaged has had the thing so long that no action at law could be brought against him by reason that the statute of limitations would bar

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1. To set up the right of prescription, between private individuals, on a possession short of thirty years, the title must commence in a fair and formal manner.
2. Prescription requires a continued, uninterrupted, peaceable, public and unequivocal possession by one who is master, or who has good reason to think himself so, and it cannot be allowed against the crown.
3. Before the change of government, no one was authorized to be owner of any land in this State, without the grant or permission of the proper officer.
4. The object of the act of Congress of 1812, confirming lots, &c., was to confirm to the inhabitants of the towns and villages therein enumerated, the lots occupied or possessed by them prior to Dec., 1803.
5. An estoppel must be certain to every intent, and precise and clear.
6. There can be no estoppel, if the matter alledged be not material.
7. A person is always estopped by his own deed, and will not be allowed to aver any thing in contradiction of what he has once solemnly and deliberately avowed.
8. Absence beyond the seas for seven years, without being heard from, raises the presumption of death.

ERROR to St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of ejectment commenced in the Circuit Court by the plaintiff in error against the defendant in error, to recover the undivided moiety of a lot of ground in the City of Louis, containing 75 feet, French measure, by 120 feet, being the east half of a lot 120 by 150 feet, French measure, which last named lot is the northwest quarter of block No. 57, as designated on the plat of the city of St. Louis. The defendant had a verdict and judgment, to reverse which judgment the plaintiff now prosecutes his writ of error in this Court. The evidence is all preserved by a (530) bill of exceptions, from which it appears that Jean Salle dit Lajoye, the father of the plaintiff, about the year 1769, built a stone house on the northwest corner of the square or block No. 57; and had a garden, and enclosed the west half of the square, the northeast portion of which he purchased from one Bon Varlet who had settled upon it a few years before, and which includes the land in dispute; and continued in possession of the same until he left this country for France in 1792 or '93; at which time he removed and settled in Bordeaux, where he continued to live up to the 29th of December, 1817. Since which time he has not been heard from. About the year 1770, Jean Salle intermarried with one Marie Rose Panda, by whom he had a son (the present plaintiff) and a daughter (Helene Leroux.) When he removed from St. Louis to Bordeaux, he took his son with him, and left his wife and daughter in possession of his house, who, together with Peter Primm the defendant, and his, Primm's wife, (the daughter of Helene Leroux,) have continued ever since to occupy the northwest quarter of said block or square, the east half of the northwest quarter of which the defendant had possessed exclusively since 1809. Eighteen months or two years after Jean Salle removed to Bordeaux, his son the plaintiff returned, and

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has ever since resided in the country, but not on the lot or square on which his mother and sister lived. Marie Rose, the mother of the plaintiff, died in 1830. From the time the plaintiff returned from France, up to the 29th of Dec., 1817, Jean Salle, the father, had no intercourse with his family. The manner of his removal and the circumstances attending it as detailed in the evidence, as also a letter received from him of the date of the 29th Dec., 1817, shows clearly that when he removed to Bordeaux in 1792, he intended to abandon his family and the country, and no intention could have been more fully acted out or persevered in. It was proved that Marie Rose, the mother of the plaintiff, died in 1830, at the advanced age of 104 years, and the witnesses state Jean Salle, the father was, or appeared to be, as old as his wife; and not having been heard from since 1817, and being then about ninety years old, (531) the plaintiff relies upon the presumption of his death, and claims as heir to his father the undivided moiety of the lot sued for; insisting, first, that the title of Jean Salle, his father, was a good and perfect one, according to the law of prescription, in force whilst the country belonged to Spain; or else, that the act of Congress of the 13th of June, 1812, operated a confirmation to his father by virtue of his prior possession of the lot; and again, the plaintiff insists, that if it be held that Jean Salle had no title by prescription, and that he had abandoned his possession, and could take nothing by the act of Congress of 1812; then he claims as heir of his mother, the moiety of whatever she was entitled to claim by virtue of said act. The defendant gave in evidence a deed of conveyance dated Oct. 21st, 1816, from the plaintiff and Marie Rose, his mother, and Helene Leroux, his sister, conveying to the defendant the west or corner half of the lot of 120 by 150 feet, above referred to; in which deed is the following clause: The grantors "sell unto him, the said Peter Primm, his heirs and assigns forever, a certain town lot or parcel of ground, lying and being situate in the town of St. Louis aforesaid, containing one hundred and twenty feet fronting on Third Main street, by seventy-five on the rear, French measure, bounded westwardly by the aforesaid Third Main street, which separates the said lot from the lot of Rufus Easton, northwardly by a cross street which separates it from the lot of Paul Guitard, eastwardly by lot of Peter Primm, and on which he now lives, and southwardly by lot on which Elijah Beebe now lives;" and insists first that the plaintiff's father had no title by prescription, and that the act of Congress of 1812, operated a confirmation of the title to the mother, Marie Rose, and her son-in-law, Benjamin Leroux, who, with his wife, Helene, jointly possessed the lot within the meaning of the act; and secondly, that the deed from Marie Rose to Peter Primm above referred to, admitted the title of the lot in dispute to be in Peter Primm, and that the plaintiff, as heir of his mother, is estopped from claiming any portion thereof. Upon this state of facts, various instructions were asked on the part of the (532) plaintiff, which were refused, and on the part of the defendant which were given. It is not now our purpose to notice them in detail; but to proceed to the examination of those of them only, on which the parties mainly rely, (i. e.) first, did Jean Salle acquire title by prescription to the lot in question? The right of prescription has been heretofore but little discussed or investigated, and no decision, it is believed, has ever been made upon it in this Court. The doctrine, as it is to be collected from the Partidas, the digest of the civil law prepared for the Territory of Orleans in 1808, and from Febrero, leaves it somewhat doubtful, whether the right of prescription could ever arise as against the King. The principles upon which the right is founded according to *Febrero Lib. III, cap. II, S. 239* are, "first, for the pub-

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lic good, to the end that the dominion of property might not remain for a long time or almost always uncertain. Second, to avoid the innumerable and perpetual suits which might otherwise originate. Third, that the possessors of property might not be always in dread of losing what they had honestly obtained; and fourth, to punish the indolence of those who were tardy in recovering their property; so that they should impute the loss of it to themselves, since the law protects those who watch and not those who sleep."

In order to set up the right, as between private individuals, on a possession short of thirty years, the title must commence in a fair and formal manner. The principal laid down in the civil code, and which is recognized both by the Partidas and Febrero, is, "that a man who becomes possessed of an immovable estate fairly and honestly, and by virtue of a *just title*, may prescribe for the same after the expiration of ten years, if the true proprietor resides in the Territory, and after twenty years, in case said proprietor resides abroad," see civil code, title prescription, sec. 11, art. 67. This is the authority upon which the counsel for the plaintiff mainly rely, in order to make out their title by prescription. A slight examination will suffice to show, that it has reference to individual claimants, and cannot with any reason be made to apply to the King or Government. The King is never presumed to be absent from his dominions. His Territories are under the command and in the possession of his officers, and he cannot be charged with indolence in not resuming what had never been parted with. In looking a little further to other provisions of the law, it will be still more evident that the one relied on in this case, was not intended to authorize an individual to prescribe against the crown.

Prescription requires a continued, uninterrupted, peaceable, public and unequivocal possession *animo domini*, (i. e.) by one who is master, or who has good reason to think himself so, *Civil Code*, sec. 1, art. 38. And the circumstance of having been in possession by the permission or through the indulgence of another, gives no legal possession upon which to prescribe; but the person so obtaining possession, will be esteemed to hold for him who grants the indulgence or permission. Jean Salle, was among the first who settled in this country. When his possession of the lot in question commenced, it was known to all that the King was the proprietor of the soil, and had granted but little of it away to the settlers.

Without a grant or permission to settle, obtained from the proper officer, no one could therefore feel authorized to consider himself *master* of a single foot of land. It was not in this new colony, as it was or might be presumed to be in Spain; that the evidences of title commencing in regular and formal grants, had been lost or destroyed through lapse of time. As between individuals, a title commencing by permission or force or fraud, could not be prescribed for in less than thirty years. Salle's possession, as against the government, cannot be placed upon a more favorable footing; for, though he might have purchased a part of the lot in dispute of Bon Varlet by formal sale, yet in order to build up the title on this purchase, Bon Varlet must have sold in good faith, believing at the time that he was the lawful owner, which it is clear he could not have done; the law being, "that he who alienates and he who receives the thing, must both act in good faith, believing they had a right to do so." (*Partidas Law 18*, p. 383.) It is next insisted on by the counsel for Salle, (and they cite *Partidas L. 21*, p. 384, *Civil Code*, title prescription, sec III, art. 65, p. 486, *Febrero Lib. III*, cap. 11, S. 490, in support of the position,) that thirty years' possession however acquired, will give title against all the world, and they contend

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that Salle's possession was continued after he left the country in 1792 or '3, since the law regards the possession of the wife and daughter as his possession, for the purpose of setting up the right of prescription. To this there are two answers, first, J. Salle had openly abandoned his family and the country, without the purpose of ever returning to them, and so stopped thereby the running of the right; and second, the right must be set up by the *actual possessor*, who, as donee, vendee, alienee or heir, may join the prior possession of the donor, vendor, alienor or ancestor, to their own possession, and so make out the time required to set up the right in the particular case. J. Salle had neither the natural possession, as it is termed in the civil law, (which means an actual corporal common law possessio pedis,) nor a civil possession, which is raised by force of law, where the possession, instead of being relinquished or abandoned, is merely committed by the proprietor to his family or agent with the purpose of resuming it again soon, or at a time fixed or appointed. Let us now see if J. Salle could claim any thing by virtue of the act of Congress of 1812, above cited. The express object of that act, was to confirm to the *inhabitants* of the towns and villages therein enumerated, the lots occupied or possessed by them prior to Dec. 1803. The most liberal construction of the act, could not, we apprehend, extend its provisions further than to the legal representatives of the last legal owners or possessors, prior to, and at the period referred to in the act. J. Salle was not only not an inhabitant at the passage of the act, but ~~he~~ had ceased to be an inhabitant long before the period referred to. It would be too unreasonable to suppose that where different persons at different periods had succeeded to the possession of the same lot, that the act intended to confirm the title to each possessor, or that where the first possessor had abandoned or transferred his possession, the act intend-(535) ed, nevertheless, to confirm the title to him, upon the maxim invoked by the plaintiff's counsel, "that the prior in possession is the better in right." It is not perceived that any principle of reason, justice or policy, could have moved the Congress of the United States to enact such a provision. The great object of the act was to quiet the villagers in their titles to property (so far as the government was concerned) which had been acquired, in many instances, by possession merely, under an express or implied permission to settle, and which had passed from hand to hand without any formal conveyance. In such cases, possession was the only thing to which they could look, and taking it for granted that those who were found in possession at the time the country was ceded, or who had been last in possession prior thereto, were the rightful owners, the confirmation was intended for their benefit. Marie Rose, with her son-in-law, Benjamin Leroux, (the husband of Helene,) had remained in possession of the lot from the time J. Salle left St. Louis in 1792 or '3, up to the period fixed in the act of 1812; and they were the persons to whom the confirmation enured. The right of the plaintiff to recover in this action might have been readily disposed of so far as he claims title through his father, without having entered into the consideration of the doctrines of prescription; since, from the record, it does not appear that J. Salle is dead, and the plaintiff could not claim as heir whilst his father lives. The questions arising fairly, however, and being considered essential to the final adjudication between the parties, it was thought best to notice them. The next question to be considered is, whether the plaintiff can claim as heir to his mother, she being dead? and if so, how much or to what extent? Marie Rose and Benjamin Leroux, her son-in-law, were the inhabitants whose possessions the act of 1812 intended to confirm. The legal existence of Helene Leroux (who

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lived with them) was merged in that of her husband so that she could acquire no title except through her husband. The confirmation, under the act, enured then, to Marie Rose and Benjamin Leroux only, who took each an undivided moiety. Upon the death of Marie Rose, her daughter Helene, became equally entitled with the (536) plaintiff, to the undivided moiety of their mother, so that the plaintiff as heir to his mother, may rightfully claim and recover the one undivided fourth part of the lot sued for, unless it can be held (as the counsel for the defendant contends) that as heir to his mother, he is estopped from asserting his title by the clause above recited, from the deed of conveyance executed to the defendant in 1816, by the plaintiff together with his mother Marie Rose, and Benjamin Leroux and wife. To dispose of this question it becomes necessary to examine the doctrine of Estoppels. It is insisted on the part of the plaintiff in error, that this deed to Peter Primm cannot estop him from recovering. The objection taken is, first, that this estoppel is uncertain in this, that the acknowledgment that the lot was Primm's lot, does not show how much interest Primm had in the lot, whether he was lessor for years, or tenant for life or in fee. To support this position, 2 Coke Litt. 352, a. is cited.

The rule there laid down is, that every estoppel, because it concludeth a man to alledge the truth, must be certain to every intent, and not to be taken by argument or inference. How it can make any difference to the plaintiff, whether the estate of Primm is for years or for life, is not easily understood. If it was Primm's lot then, it continues to be his yet, since it is not shown that he has parted with it. When a thing belongs to a man he has dominion over it, to the full extent to which the law will give dominion in such thing. It is true, as argued by the counsel for Salle, that Primm's interest may have long ago expired. If so, it is for him to show that matter to qualify his general acknowledgment. It is next said that the rule is, that every estoppel ought to be a precise affirmation of that which maketh the estoppel, and not spoken impersonally. In this case, the affirmation that the lot is the lot of Peter Primm, is precise and clear, and accords with the rule. In Comyn's *Dig.* vol. 4, p. 79, the same doctrine is laid down. There it is said, that if a thing be not directly and precisely alledged, it is no estoppel, the example given is, that if the defendant pleads within age, (to-wit) of the age of fourteen years and no more, and after judgment, brings error within seven years, and assigns error by attorney, he shall not be estopped to say that he was not of full age at the time error assigned. For the allegation after the viz. that he was fourteen years old no more, is not positive. This case shows what is meant by a precise allegation. The same author says, so is the law, if the matter of estoppel be by way of recital, and so is the law if it be alleged by way of supposal. Another rule is, that there will be no estoppel if the matter alledged be not material.

Under the authority of this rule, it is argued that the matter of estoppel in this case, is only intended to be a part of the description of the boundary of the lot, and as there is a good description without this part of it, it cannot be material. The case put in the book, (4 *Com. Dig.* 80,) shows what sort of immateriality is meant. The case is in debt on an obligation alledged to be made at A. in another action upon the same obligation, he may say that it was made at B., we know that in general it is true, that the place where an obligation was made, is perfectly immaterial; but in the case at bar, it is material whether the lot was Peter Primm's lot or not. To prove that descriptions where they are unnecessary, may be disregarded as estoppels, 4 *Cruise* 517-'18 is relied on. This author in treating of recitals says, a mis-recital of

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a former grant, will not invalidate a deed. The author says further, that it is laid down by Lord Coke, that a mis-recital does not invalidate, because it is no direct affirmation. This authority will not bear the party out. Here there is a direct affirmation that the lot on which Primm lived, was Primm's lot. And the phraseology in reference to Primm, differs from that made use of towards the other persons named by way of description merely. Moreover, it is in proof that Primm's house stood on the spot where Bou Varlet first built, (i. e.) on the Eastern edge of the lot sued for, leaving some sixty or sixty-five feet between the house and the Eastern limit of the lot sold to Primm in 1816; so that the reference to it, as the lot of Peter Primm, and on which he then lived, shows that an eye was had to the extent of Primm's lot, (538) and that the whole of it was embraced in the clause recited. And this answers another objection raised by Salle's counsel, that it does not appear whether Primm's lot referred to in the deed, was seventy-five feet or seventy-five inches, or of any particular extent. As to descriptions in a deed, we are referred to the same author, (4 *Cruise Dig.* 308) where it is laid down that a lessee is not estopped by a description of the lands contained in his lease, for this is not the essence of the deed. He may therefore show that what, in the lease, is called meadow, has been sometimes ploughed. This case shows that as to the character of the property, the party is not tied down to an exact description.

On the other hand, the law appears to be, that a person shall always be estopped by his own deed; that is, he shall not be allowed to aver anything in contradiction of what he has once solemnly and deliberately avowed. In the case of *Shelley v. Wright*, (*Willis Rep.* p. 9,) it was decided that where it was recited in the condition of a bond, that the obligor had received divers sums of money for the obligee, which he had not brought to account, but acknowledged that a balance was due to the obligee, that the obligor was estopped to say that he had not received any money to the use of the obligee, see also as to this point, (4 *Cruise* 72, Co. *Litt.* 352 a.) According to our view of these authorities, we are of opinion that the plaintiff is estopped to alledge that the lot which in 1816 he said was Primm's lot, is not now Primm's lot. It is next insisted that if the plaintiff be estopped by the deed, it can only be as to the title which he then had, and that he is not estopped as to any title which may have fallen on him by descent from his mother who has since died. And here it is urged that the marriage and the rights of community still subsisted, notwithstanding the abandonment and removal of J. Salle; and the property confirmed to Marie Rose by the act of Congress of 1812, became subject to the marital rights of the husband, and so by the Spanish law could not be alienated by the wife, whose deed of conveyance to Primm was null and void. If this position could be maintained, it will be still seen, that the plaintiff could not recover in this action, (539) since the death of J. Salle, to whom the property passed upon the death of Marie Rose his wife, has not been proved or found by the jury, from the presumptive evidence in the case. But let us look a little into the Spanish law on this point, and see how far the authority cited (*Febrero lib. 1, co. 11, p. 238,*) will sustain the position assumed by the plaintiff's counsel. It is laid down that property acquired during marriage is to be divided equally between the two (husband and wife,) "if they live together according to the provisions of the law, (2 tit. 9 lib. 5 *Ruop.*) which says that every thing the husband and wife shall acquire or purchase whilst they are living together, shall belong to them both in moieties; and if it be a gift of the King and it be given to both, the husband and wife may take it; and if it be

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given to one of them, the one to whom it is given may alone have it," &c. The author proceeds, "the sage conclusion in the preceding number, holds good, and applies not only when the husband and wife live together, in the same town and house; but although they may be living in different towns or countries, provided the marriage and their mutual consent and union of wills continue, and no divorce has taken place. For example, if the husband be employed abroad, and the wife, because the climate is prejudicial to her health, or for any other just cause, remains in her own country; or if the wife pursues one traffic in one part of the country, and the husband another in a different part, then in these and other like cases, the marriage and society and union of their wills subsist, although their bodies be separated, and so whatever one or the other, or both may gain, should be brought into community and be divided equally. Yet some maintain that in order for this (community) to take place, it is necessary that there should be simultaneous cohabitation; but this opinion has no solid foundation and may be disregarded, &c.; no person can feel much difficulty in applying these principles to the case at bar. J. Salle was not employed abroad with the purpose of ever returning; no society, or intercourse, or union of wills subsisted; on the contrary, the wife and family had been entirely (540) abandoned for more than twenty years, without having even known of the existence of her husband. The presumption in law is, that he was dead, so that Marie Rose was in law a *femme sole*, with power to make a deed binding upon herself and all claiming under.

According to the English decisions, absence for seven years beyond seas without being heard from during that time, raised the presumption of death, and this from analogy to a British statute. We have a statute passed originally in 1807, respecting Bigamy, which declares that a person shall not be subject to the penalties of the act whose husband or wife shall have been continually beyond seas for seven years, (*see Rev. Code*, p. 307). Seven full years had elapsed after the passage of this act, when the deed was made by Marie Rose, to say nothing of the period elapsed before. We are therefore of opinion that the mother of the plaintiff did, by her deed, estop herself from claiming the lot now sued for, and that consequently the plaintiff, who claims through her, is estopped. The judgment of the Circuit Court is therefore affirmed with costs.

TOMPKINS, J., dissenting.

I concur in all of the opinion except so much thereof as relates to the estoppel.

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1. The reported decisions of the Courts, and the opinions of eminent Lawyers, contained in their writings, are evidences of the unwritten law among civilized nations.
2. In Europe, the will of the Sovereign, in judicial matters, is known through the Courts of Justice.
3. In Louisiana, under the French Government, Indians could not lawfully be reduced to slavery.

TOMPKINS J., delivered the opinion of the Court.

Marguerite brought her action against Chouteau in the Circuit Court of St. Louis (541) county to recover her freedom. In that Court judgment being given against her, she appealed to this Court. On the trial of the cause, she gave in evidence that her maternal grandmother was an Indian woman; and some of the witnesses stated that they had heard aged persons say, that she was of the Natchez nation, and made a prisoner by the French in the war which terminated in the extinction of that nation.

On the part of the defendant, evidence was given that the appellant was descended from a negro woman in the maternal line. Evidence was also given by the defendant, that many Indians were sold as slaves in the province of Louisiana, while it was under the dominion of France; and also that the maternal ancestors of the plaintiff, appellant here, had been alienated as slaves. The counsel for the defendant prayed the Circuit Court to instruct the jury,

First. That if they found from the evidence, that the maternal grandmother of the plaintiff was an Indian woman of the Natchez nation, taken captive in war by the French, and that she was held and sold as a slave in the province of Louisiana, while the same was held by the French, and prior to the year 1769; or, if they found that her maternal grand mother was an Indian woman taken captive in war, and was held and sold as a slave as above mentioned, then she and her descendants ought to be considered by the jury as being lawfully slaves.

Second. If the jury find that the maternal ancestor of the plaintiff was an Indian negro woman, and that she was held as a slave in the province of Louisiana, while was held by the French, she and her descendants ought to be taken by the jury to have been lawfully slaves.

Third. That Indians might lawfully be reduced to and held in slavery in the province of Louisiana, while it was subject to the crown of France.

These instructions were given by the Court and resisted by the plaintiff; other instructions prayed by the defendant and resisted by the plaintiff, were given, but each side being anxious for a decision on the merits of the case, no notice need be taken of minor objections.

On the part of the appellant it is insisted, that all Indians in the late province of (42) Louisiana, were, while it was held by France, and Spain, absolutely free, and at their descendants are so now. Negroes it is admitted are to be presumed slaves,

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their ancestors being imported to the continent as slaves; but Indians were around and among the settlements of the white men, in the full enjoyment of their personal liberty, acknowledging no inferiority to white men, and treating them either as national friends or national enemies. To show a descent from this race, it is contended, is to show a right to freedom; and if in the history of the country there were a time when Indians might, under the sanction of law, be reduced to slavery, then the proof of a right to freedom, by virtue of descent from an Indian, becomes liable to be rebutted by evidence bringing the case of the claimant under the operation of such law. 1 *Washington*, 123 and 233, *Jenkins v. Tom, and Coleman v. Dick and Pat*; and 2 *Hen. and Mun.*, 160.

On the part of the appellee it is contended, that his right to hold the appellant in slavery, is established by the practice of the country, at the time her supposed maternal ancestor was made a prisoner of war; and he gave evidence that, while Louisiana belonged to the crown of France, there were many Indian slaves at Fort Chartres and other villages in that province. One of the witnesses most relied on, says, that he arrived in the country in 1756, and in 1757 went to Fort Chartres; and that there were then at that place, and elsewhere through the country, a great many Indian slaves, and but few blacks; the Indians were universally acknowledged as slaves, and frequently sold as such before the Governor; he himself sold several, one to the commandant, and afterwards added, that the commandant he spoke of was the English commandant at Kaskaskia. The appellee puts his right to hold the appellant in slavery on the same ground, whether she be descended in the maternal line from an Indian or a negro woman. It was further contended for the appellee, as evidence of the law of the land, that the French commandant Bourgmont, bought Indians for slaves on the Missouri, and sent them down to New Orleans to work on his plantation, and he urges that this act demonstrates more clearly what was the law of the land than a speech of the same person in which white men were censured for trading with Indians for slaves. Reference is made to 3 *Martin Rep.* 285, *Seville v. Chretian*, and 3d volume *Du Pratz' History of Louisiana*, where the author gives an account of Bourgmont's voyage from Fort Orleans, on the Missouri, to the Padoucas, a tribe living west of the Kansas river, and of the object of that voyage.

It appears from the evidence that nearly one hundred years before the commencement of this suit, the supposed maternal grandmother of the appellant was brought to Fort Chartres, in Louisiana, and was there held as a slave till her death. If then, under the laws of France, she was justly held as a slave, the appellant is at this time in the same condition, the law of nations securing to the claimant his property, when the province was transferred by France to Spain, by the secret treaty of 1763, and the several treaties when the same was transferred by Spain to France, and by France to the United States. The only case in point decided by any Court in the United States since the transfer of Louisiana, of which this Court is informed, is that of *Seville v. Chretian*, referred to by the appellee. Seville, the plaintiff in that case, was the grandchild in the maternal line of an Indian woman, brought into the province by an Indian trader in the year 1765, and by him sold to the father of the appellee. Her introduction into the province, and the sale to the ancestor of the appellee, both took place after the cession by France to Spain, and before Spain had taken possession. She, like the ancestor of the appellant in the case before this Court, was held as a slave till her death, and as she was reduced to slavery before Spain had introduced her laws into the province, the question of freedom or slavery

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was decided under the laws of France. That Court decided that during the time Louisiana was held by the French government, Indians might lawfully be held in slavery. A manuscript copy of the report of that case has been submitted to this Court; according to it, "a number of depositions (admitted by the parties to have (544) been correctly taken, and to be proper evidence in the cause) were read to prove that at the time the Spanish government took possession of the country, viz: in the year 1769, under the secret treaty of cession made between France and Spain in 1763, many of the inhabitants of the colony, which had been established and settled under the authority of the French government, held and possessed Indians as slaves; and it seems, adds that Court, to have been a belief pretty general among them that the practice of holding Indians in slavery was tolerated and authorized by the government. The fact that a considerable number of Indians and their descendants were held in slavery at the period alluded to is clearly proven."

The case of *Seville v. Chretien* being mostly relied on by the counsel in the cause before this Court, and in fact the arguments in each case being nearly the same, that case will be particularly examined. In that case the Court are made to say, according to the manuscript report furnished us, "slavery, notwithstanding all that may have been said and written against it as being unjust, arbitrary and contrary to the laws of human nature, we find in history to have existed from the earliest ages of the world down to the present day."²

In investigating the rights of the parties now before the Court, it is deemed unnecessary to inquire into the different means by which one part of the human race have, in all ages, become the bondsmen of the other, such as captivity, being the offspring of those already enslaved, &c. However, we are of opinion that it may be laid down as a legal axiom, that in all governments in which the municipal regulations are not absolutely opposed to slavery, persons already reduced to that state may be held in it; and we assume it as a first principle, that slavery has been permitted and tolerated in all the colonies established in America by European powers, most clearly as relates to the blacks or Africans, and also in relation to the Indians, in the first periods of conquest and colonization. Taking this principle for granted, it accounts in some measure for the absence of any legislative act of the European powers for the introduction of slavery into their American dominions. If the record of any such act exist (545) we have not been able to find any trace of it. It is true, that Charles the fifth in the first part of the sixteenth century granted a patent to one of his Flemish favorites, for the exclusive right of importing four thousand negroes into America, which were purchased by some Genoese merchants, who were the first who brought into a regular form the commerce for slaves between Africa and America.

A few years before, a small number of negroes had been introduced by the permission of Ferdinand; but the privilege granted by the Emperor, so far from being the first introduction of slavery into the new world, was intended as a means of enabling the planters to dispense with the slavery of the Indians, who had been reduced to a state of bondage by their European conquerors. A full account of these transactions may be seen in Robertson's History of America. On turning our attention to the first settlement of the British colonies in America, we find that the introduction of negro slaves into one of the most important was accidental. In the year 1616, as stated by Robertson, and 1620 by Judge Marshall in his life of Washington, a Dutch ship from the coast of Guinea sold a part of her cargo of negroes to the planters on James r.ver; this is the first origin of the slavery of the blacks in the British

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American provinces, about twenty years after slaves were introduced into New England.

All this took place without any previous legislative act on the subject. And it is believed that Indians were, at the same time, and before, held in bondage. The absence of any act or instrument of government, under which their slavery originated, is not a matter of greater surprise than that there should be none found authorizing the slavery of the blacks. The first act of the Legislature of the province of Virginia on the subject of the slavery of the Indians, was passed in 1670, and one of its provisions, as we are informed by Judge Tucker, prohibits free or manumitted Indians from purchasing christian servants. The words "free or manumitted" are useless and absurd, if there did not exist Indians in slavery, and Indians who had been (546) slaves and had been manumitted before and at the time this act was passed. Indeed, from the history and legislative proceedings of the British colonies, both in the West India Islands and in North America, it clearly appears that in most if not all of them, the slavery of the Indians was tolerated by government in the early periods of the settlement, without any specific legislation on that subject. The French government was later in establishing colonies in America than the British and Spanish. In our researches on the subject under consideration, we have not been able to discover any legislative act of it, by which the colonies were authorized to hold Indians in bondage; but that it was customary to purchase and hold some classes of them in slavery cannot be doubted. This cannot have been without the permission, or at least the toleration of government. Moreau de St. Mery, speaking of the black population of St. Domingo, observes, that among it are the descendants of some Indians from Guiana, Louisiana, &c., whom goverment and individuals, in violation of the law of nature, deemed it profitable to reduce to slavery, 1 hist. St. Dom. 67. In the beginning of the eighteenth century, he adds, there were upwards of three hundred Indian slaves in the French part of St. Domingo. In 1830, the Governor of Louisiana sent three hundred of the Natchez tribe to be sold. Several arrived after that period from Canada and Louisiana. Here we have historical facts, establishing beyond contradiction, the holding of Indians as slaves in one of the French colonies, many of whom were transported from the very colony in which the ancestors of the plaintiff and appellant were held in bondage. Were it necessary to prove that they were legally held so, the evidence of it would be found in their being taxed as slaves, 2 St. Dom. Laws 541: a circumstance which creates at least a very violent presumption that the municipal regulations of the French colonies did not prohibit the slavery of the Indians. This appears to have been the opinion of the Spanish government which we have seen succeeded to the French in Louisiana. Governor O'Reilly in 1769, on taking possession of the colony, discovered that a considerable number of (547) Indians were held in slavery by the French colonists. This he declared by a proclamation to be contrary to the wise and pious laws of Spain; but by the same instrument he confirmed the inhabitants in possession of such Indian slaves until the pleasure of the King in this respect could be known. Here is then a recognition of the right of the possessors to hold their Indian slaves, until the legislative will of the monarch should deprive them of it. This never did happen. In conformity with this opinion is a decree of the Baron de Carondelet, twenty-five years after, in 1794, by which he orders two Indians, Alexis and David, to return to and abide with their owners, until the royal will was expressed to the contrary. The inhabitants of the colony of Louisiana, while under the government and dominion of France, held In-

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dians in slavery. The Spanish government under which they passed, recognized their right to hold them until it should be altered by a declaration of the King's will: it never was declared. The colony, without any change in the condition of the original population, is re-ceded to the French nation, and by it transferred to the United States, under a treaty securing to its inhabitants their rights to property as they stood under the former government. The rule of law first settled by that Court, and which is called a legal axiom, viz: "That in all governments in which the municipal regulations were not absolutely opposed to slavery, persons already reduced to that state may be held in it," might perhaps be more accurately expressed in these terms, "that in all governments where there is no positive law against slavery, those persons already reduced to that state may be held in it." As all the reasoning both in the case of *Seville v. Chretien*, and in that before this Court, seems to be founded on this *legal axiom* here assumed, it becomes necessary to examine whether it be true in fact. Under the dominion of the Roman emperors, it is well known to all persons conversant with history, that there were great numbers of slaves in Europe. On the decline of that empire, when it was overrun by the northern barbarians, the number of slaves was not lessened; at this period slavery no longer exists there. Those who (548) recollect the difficulties encountered by Peter the first of Russia, an arbitrary and most politic prince, when he attempted to change the uniform of his life guards, will scarcely contend that the Kings of Europe, never arbitrary, were able by written laws alone to abolish slavery. By the force of public opinion alone it has been abolished in Europe. *Montesque, in chap. 8, b. 15, of the Spirit of Laws*, says, "Plutarch tells us, in the life of Numa, that in the age of Saturn there was neither master nor slave, in our climate christianity has restored that age." "Dans nos climats le Christianisme a ramene cet age." In the succeeding chapter of the same book entitled "Inutility of Slavery among us," he says, what makes me think so is, that before christianity had abolished civil slavery in Europe, &c., "ce qui me fait penser ainsi c'est qui avant que le christianisme eut éboli en Europe la servitude civile, &c." Doctor Robertson the historian above referred to, in a sermon preached in Edinburgh on 6th Jan., 1775, before the society for the propagation of christian knowledge, ascribes the abolition of domestic slavery in Europe to the influence of christianity. This sermon is prefixed to some of the later editions of the works of the historian. Vattel, speaking of the right to make slaves of prisoners of war, concludes the article in these words, "I shall dwell no longer on this subject, and indeed this disgrace is now happily extinct in Europe," see *Law of Nations*, b. 3, ch. 8, sec. 152. Sir Wm. Blackstone tells us, that when tenure in villeinage was virtually abolished by the statute of Charles the second, there was hardly a pure villein left in the nation; and then he adds, Sir Thomas Smith testifies that in all his time (and he was Secretary to Edward the sixth) he never knew a villein in gross throughout the realm, see 1 *Bl. Com.*, p. 96. The abolition of slavery in England too is by that author ascribed to the influence of christianity. The same author informs us also that when an attempt was made to introduce slavery into England by *Stat. 1 Edward VI, chap. 3*, which ordained that all idle vagabonds should be made slaves, &c., the spirit of the nation could not brook this condition even in the most abandoned rogues, and therefore this statute was repealed in two years afterwards. Thus we see that in Eng- (549) land so far were the people from being disposed to suffer one man by force to enslave another, even the boasted omnipotence of Parliament was unable to introduce slavery in the reign of Edward the sixth. If the Parliament of England dare

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not attempt to enforce slavery by law, it will scarcely be contended that any other government in Europe would be strong enough to succeed in the attempt. None of them at least have been rash enough to make the experiment. We will pass over the writ granted by Lord Mansfield to bring before him the body of James Sommerset, and the unanimous decision of the Court of King's Bench, in consequence of which Mr. Christian declares, that the air of England is too pure for a slave to breathe in.

Thus we see that in Europe, where slavery once prevailed, it has by the silent influence of the christian religion alone been abolished, and so far is the spirit of the people from tolerating the practice, that the most energetic government on that continent has not been able to restore it. The legal axiom then of the Supreme Court of Louisiana, viz: "that in all governments in which the municipal regulations are not absolutely opposed to slavery, persons already reduced to that state may be held in it," is no axiom. The natives of Europe then migrating to America carried with them no unwritten law to authorize them to enslave an Indian. But that Court assumes the ground, "that slavery has been permitted and tolerated in all the colonies established in America by European powers, most clearly as relates to blacks or Africans in the first periods of conquest and colonization," and refers to Robertson's history of America as authority to sustain the assumption. But it is also contended that this toleration and permission of slavery was not by means of any legislative act for such purpose made. Admitting that the European powers silently permitted their subjects to enslave the Africans, this would be no evidence in a Court of law against an Indian contending for freedom. It would be a violation of the plainest rules of evidence. It is not therefore conceived necessary to embarrass this question with an inquiry whether the several powers of Europe tacitly or expressly by legislative act permitted their subjects to capture Africans and sell them as slaves in America. As however the counsel for the appellant has furnished an authority to show that it was by an express law of France that her subjects traded in African slaves; that authority will be given to satisfy those who may think there is need of it. It is found in the 4th chapter of 1st vol. of *Spirit of Laws*, entitled, "another origin of the right of slavery." The author concludes his chapter in these words: "Louis XIII was extremely uneasy at a law by which all the negroes of his colonies were made slaves; but it being strongly urged to him, as the readiest means for their conversion, he acquiesced without further scruple." But although Spain might either by an express legislative declaration, or by her silence and forbearance, permit the Indians within the limits of her colonies to be enslaved, yet still this is no evidence that France extended the same privileges to her colonists. It does not however appear that Spain ever granted her assent to this practice either expressly or impliedly. She acquiesced in it, and assented to it, as England acquiesced in and assented to the Norman conquest, because she could not prevent it: and to prove this we need resort to no other authority than that of the great and accurate historian by whom, according to the report of the case of *Seville v. Chretien* submitted to us, the Supreme Court of Louisiana undertakes to prove the contrary. In the 8th book of the History of America, Robertson takes a view of the interior government, commerce, &c., of the Spanish colonies; after vindicating the Spanish monarchs from the charge of forming a plan to exterminate the natives, he says, "the Spanish monarchs, far from acting upon any such system of destruction, were uniformly solicitous for the preservation of their new subjects. With Isabella, zeal for propagating the christian faith, to

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gether with the desire of communicating the knowledge of truth, and the consolations of religion, to a people destitute of spiritual light, were more than ostensible motives for encouraging Columbus to attempt his discoveries. Upon his success she (551) endeavored to fulfil her pious purpose, and manifested the most tender concern to secure not only religious instruction, but mild treatment, to that inoffensive race of men subjected to her crown. Her successors adopted the same ideas; and on many occasions which I have mentioned, their authority was interposed in the most vigorous exertions, to protect the people of America from the oppression of their Spanish subjects. Their regulations for this purpose were numerous and often repeated. They were framed with wisdom and dictated by humanity. After their possessions in the new world became so extensive, as might have excited some apprehension of difficulty in retaining their dominion over them, the spirit of their regulations was as mild as when their settlements were confined to the islands alone. Their solicitude to protect the Indians seems rather to have augmented as their acquisitions increased; and from ardor to accomplish this, they enacted and endeavored to enforce the execution of laws, which excited a formidable rebellion in one of their colonies, and spread alarm and disaffection through all the rest. But the avarice of individuals was too violent to be controlled by the authority of laws. Rapacious and daring adventurers, far removed from the seat of government, little accustomed to the restraint of military discipline while in service, and still less disposed to respect the feeble jurisdiction of civil power in an infant colony, despised or eluded every regulation that set bounds to their exactions and tyranny. The parent state, with persevering attention, issued edicts to prevent the oppression of the Indians; the colonists regardless of these, or trusting to their distance for impunity, considered and treated them as slaves. The Governors themselves, and other officers employed in the colonies, several of whom were as indigent and rapacious as the adventurers over whom they presided, were too apt to adopt their contemptuous ideas of the conquered people; and instead of checking, encouraged or connived at their excesses. The desolation of the new world should not then be charged on the court of Spain, or be considered as the effect of any system of policy adopted there. It ought to (552) be imputed wholly to the indigent and often unprincipled adventurers, whose fortune it was to be the conquerors and first planters of America, who, by measures no less inconsiderate than unjust, counteracted the edicts of their Sovereign, and have brought *disgrace upon their country.*" We have still higher authority, that in the State of Virginia Indians were never enslaved but by express law, viz: the acts of the provincial assemblies. It will not here be enquired whether Judge Tucker, in his notes on Blackstone, is at variance with himself, sitting as a Judge of the Court of Appeals in his own State. Suffice to say, that he does not intimate any change of opinion. In 1679, the Legislature of Virginia, by a legislative act, permitted Indians taken prisoners in war to be enslaved, and this act was repealed in 1691. The Courts of that State have uniformly decided that any person claiming an Indian as a slave must show property acquired within the twelve years during which the law remained in force, and Indians have sued for and obtained their freedom in the Courts of that State after being held in bondage nearly one hundred years. See 1 *Washington's Rep.* 123, *Jenkins v. Tom*, and page 233, *Coleman v. Dick*, 1 *Hen. and Mun.* 134, *Hudgens v. Wright*, and 2 *Hen. and Mun.* 149, *Pallas and others v. Hill and others*. In the last cited case, viz: *Pallas and others v. Hill and others*, the subject is most fully investigated. Before that time some doubt had existed, not as to the time when

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the statute had first authorized the enslaving of Indians, but as to the time when that right was taken away. The Court it appears, had taken time to search for the original acts and had found them, and the decision was, "that the act of 1691, and not the printed revisal of 1705, fixes the period at which the right of making slaves of Indians was restricted."

In such a case as this it might not be improper to attend to the argument of the counsel employed in the cases cited, as authority in the cases cited from the Virginia books; they were men not unknown to fame. In the case of *Coleman v. Dick and Pat.*, Wickham was for Coleman, who claimed a right of property in the Indians, (553) and Marshall was for them; and in the case of *Hudgens v. Wrights*, Randolph (Edmund) was for the persons claiming the right of property in the Indians. In neither of these cases cited did the counsel pretend to claim for their clients a right of property in Indians, except by the statute of the province. In the case of *Hudgens v. Wrights*, the persons suing for freedom had been brought before the high Court of Chancery. The defendant in that Court being about to send them out of the State, a writ of ne-exeat was obtained from the Chancellor, on the ground that they were entitled to their freedom. On the hearing, the Chancellor perceiving from his own view, that the youngest of the appellees was perfectly white, and that there were gradual shades of color between the grandmother, mother and grand-daughter, (all of whom were before the Court,) and considering the evidence in the cause, determined that the appellees were entitled to their freedom; and moreover, on the ground that freedom is the birth-right of every human being, which sentiment is, (he says,) strongly inculcated by the first article of our political catechism, the bill of rights. He laid it down as a general position, that whenever one person claimed to hold another in slavery, the onus probandi lies on the claimant. The case was elaborately argued by Randolph for the appellants and George K. Taylor for the appellees. Judges Tucker and Roane delivered long opinions reviewing the opinions in the cases of *Jenkins v. Tom*, and *Coleman v. Dick and Pat*, in *1st Washington*; Judges Fleming, Carrington and Lyons, president, concurred, and the latter pronounced the decree of the Court as follows: "This Court not approving of the Chancellor's principles and reasoning on his decree made in this cause, except so far as the same relates to white persons and native American Indians, but entirely disapproving thereof, so far as relates to native Africans, and their descendants who have been and are now held as slaves by the citizens of this State, and discovering no other error in the said decree, affirms the same." This case it may be observed, afforded counsel, always prolific in expedients, a fair opportunity to excite apprehensions for the security (554) of the slave property in that State; so much of the Chancellor's reasoning as relates to the bill of rights, might, in ordinary cases, have been passed over as extra-judicial; for the complainants have made out their case by proof. But the cause was taken up and the Chancellor's judicial decision affirmed; but his extra-judicial decision was in part reversed, in order, it is reasonable to suppose, to quiet the apprehensions of the slave holders. So far, then, as the conduct of Spain and Virginia towards the native Americans may be regarded as a precedent, we are yet left to judge of the right of the French colonists to enslave Indians by the conduct of their own government. It is not pretended that there is any written law authorizing the act, and it has been shown by a quotation from Montesquieu that negro slavery was authorized in the French colonies by express law. So that we are not left at liberty to conclude that because without any written law to that effect, the

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crown of France permitted negroes to be reduced to a state of slavery, therefore it permitted the natives to be so. The next inquiry will be whether the assent of the crown of France to Indian slavery can be inferred from the acts of its officers, and from the acts and practice of the colonists within the limits of the colony. It will be recollect that it has been stated in the case of *Seville v. Chretian*, that "in 1730 the Governor of Louisiana sent three hundred of the Natchez tribe to be sold in St. Domingo, and that several after that period arrived from Canada and Louisiana, and that it appeared from the depositions of a number of witnesses, (admitted by the parties to have been correctly taken and to be proper evidence in the cause,) that at the time the Spanish government took possession of the country, viz: in 1769, many of the inhabitants of the colony held and possessed Indians as slaves, and that it seemed to have been a pretty general belief among them, that the practice of holding Indians in slavery was tolerated and authorized by the crown of France; and by testimony taken in this cause, it appears that at Fort Chartres and elsewhere in the colony, while it was subject^r to France, there were many Indian slaves and but few (555) blacks; and that the Indians were universally acknowledged as slaves, and frequently sold as such before the Governor, that one of the witnesses had himself sold several, one to the commandant, and that afterwards he added that the commandant he spoke of was the English commandant."

We are indebted to the case of *Seville v. Chretian* for the knowledge of the fact; that in 1730, the Governor of Louisiana sent three hundred of the Natchez tribe to be sold as slaves in St. Domingo. Du Pratz, a historian of considerable merit, and an eye witness of the embarkation of the Natchez sent to be sold in St. Domingo, observes a cautious silence on the subject of the number sent out. From Barbe Marbois we learn all perhaps that Mr. Perier, Governor-General of Louisiana, ever wished to be known of the number sent. Of Marbois it is sufficient to say, that he was the minister of Napoleon who negotiated the treaty by which Louisiana was ceded to the United States, and that he has lately written a history of Louisiana. He had access to the registers of the company, and there found an account of the facts he states, viz: that the tribe of the Natchez was exterminated, with the exception of a few families who escaped the general massacre and were received and protected by the neighboring tribes. Their chiefs, believed to be of the family of the Sun, were conveyed by Gen. Perier's order, to Cape Francois. The most important member of the dynasty died there a few months after his arrival. The other Suns were maintained by the company for the moderate sum of 1,888 livres 7 sous. The company applied to M. Maurepas to defray the expense. On the 22d of April, 1731, the minister wrote the directors as follows: "I am not aware that there is any other course to adopt in this matter than to order the survivors of those two Indian families to be sold or sent back to Louisiana." The registers of the company contain the following resolution: "It was resolved, to order the sale of the survivors of said families of Natchez Indians." Upon this the author remarks, that at the very time this order was given, the company was pretending to the glory of civilizing a people whose (556) chiefs were sold as slaves. Here we may pause and ask if the company dare not sell a few prisoners of war, without permission from the crown, (for Maurepas was prime minister,) whence did M. Perier, their agent, derive the authority to enslave three hundred of the same tribe. Of the number sent to be sold as slaves in St. Domingo, by order of Perier, as was before observed, Du Pratz is silent. He only says that some escaped from the Fort, who retired to the Chickasaws. The

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rest surrendered at discretion; of the number, was the great Sun and the female Suns his wives, several warriors, many women, young people and children. The reason of this reserve, we learn from Marbois, for but one volume of Du Pratz is accessible to us. Marbois tells us that Du Pratz ingeniously states, in the 1st volume of his history, printed in 1758, twenty-eight years after the capture and sale of the Natchez chiefs, that all the letters which were sent to France were intercepted. We consulted together, continues Du Pratz, on the means of forwarding them to their destination, we discovered it and availed ourselves of it. "The writers of history are obliged," Du Pratz further observes, "to treat with equal caution the dead and the living; and so delicate a matter is it to give utterance to the truth, that the pen often falls from the hands of those who are most disposed to be accurate." The colonies of Spain were planted by adventurers who fitted out expeditions and conquered at their own expense. The crown of Spain, the historian tells us, made great exertions to curb their tyranny, but was unable. The colonies of France on the continent, were planted at an enormous expense by the crown, and were always weak and under her control. Public utility, says Marbois, as well as the greatness and glory of the monarch, had, under Louis XIV, led to the favorable reception of the first proposals for the foundation of a powerful colony.

With the example of Spain before their eyes, impotently struggling to restrain the insolent rapacity of her conquering soldiery in America, and stung by the reproaches of the world for her supposed barbarous and ruinous policy, what utility to the (557) State, or glory to themselves, could the powerful and enlightened Monarchs of France hope for, by suffering the colonists of the weak province of Louisiana to reduce the natives to slavery?

But the counsel for the appellee, as before observed, contended as evidence of the law of France that M. Bourgmont, the French commandant, had purchased Indian slaves and sent them down to Orleans, and that this act of a confidential officer was stronger evidence of the law than the speech of the same commander, in which he severely reprehended the practices of the white men who traded for Indian slaves. M. Bourgmont, (according to Du Pratz, see chap. 9, vol. 3,) commandant of Fort Orleans, situated on the Missouri river, (on an Island a little above the mouth of the river Osage according to Stoddard,) departed from that Fort on the 3d July, 1724, at the head of a small force, to make a peace with the Padoucas, (Pawnees,) who were at war with the Missouris, Kansas and other tribes in alliance with the French. The warriors of the friendly tribes were to accompany him. The expedition, the author says, was undertaken by the order of the King of France, and the object was to facilitate the commercial intercourse of the French traders with the several tribes. On the arrival of the French commandant among the Kansas, he made the speech alluded to, and purchased from them several Indian slaves, (so called because the Indians made slaves of their prisoners.) Those prisoners had been taken from the Padoucas, but M. Bourgmont and several of the persons accompanying him, falling sick of the fever peculiar to the season, he sent some of the slaves down the river to the said Fort of Orleans, and in a few days after followed himself, having previously despatched a messenger to the Padoucas to inform them of his inability to proceed. This messenger conducted two of the Padouca slaves, (esclaves Padoucas) to their tribe in order to conciliate their favor, see same vol. p. 165. The slaves, says the author, at p. 169, having arrived at their village, spoke much of the generosity of M. Bourgmont, who had redeemed them; they told all he had done to make peace; in fine

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they extolled the goodness, the merit and the valor of the French so much that their (558) discourse made in the presence of the Grand Chief, spread joy over the village, and a messenger was sent to announce the news to the whole nation. Bourgmont being restored to health resumed the expedition, and on the 18th October arrived among the Pawnees (Padoucas) where he was received in the most flattering manner. The great chief in a harangue to his countrymen tells them that the Kansas would surrender all their women and children taken prisoners in war, in exchange for horses ; "that the French chief had promised it," and he continues, "you have already seen him send back two of them loaded with merchandize, without demanding pay, and he was bringing along with him two others who died on the road." Thus it appears that the prisoners purchased by the French commandant were bought or rather redeemed, for that is the word used by the author, with an intent to present them to their own tribe.

The author says that his account of his expedition was copied and greatly abridged from the journal of Bourgmont, signed by all the officers and persons attached to the expedition, and which no doubt was designed for the use of the government.

In reading it, he remarks, one cannot but observe how much delicate management is necessary in such expeditions in order to gain their good will. In the conduct of the high officers, there is nothing to be perceived which would justify the belief that the French government authorized them to reduce the Indians to slavery. Even should we admit that the sale of the three hundred of the Natchez by order of Perier was known to and approved by the government, still there was no proof that the appellant's ancestor was one of them ; and if there had been any such proof, still it might be doubted whether her purchaser would have the right to bring her back from St. Domingo to Louisiana. But the conduct of the directors of the company of the Indies affords the strongest presumptive evidence that the act of Perier was unauthorized and even unknown to them. For if he could of his own authority lawfully sell three hundred Indians, why should they apply to the minister for permission to (559) sell perhaps half a dozen. It is also said in the case of Seville v. Chretian, other Indian slaves were sent over from Louisiana and Canada. This perhaps may be the case. But it does not sufficiently appear, under what circumstances they were sent, to enable us to decide whether the act was lawful or unlawful. Between foreign nations the acts of the public officers of each are always regarded by the author as lawful until they are disavowed. But in regard to the cause before this Court we are not foreigners. In consequence of the several transfers of territory which have taken place since the year 1763, this Court has succeeded to all the jurisdiction which a French Court of law would have had at that day, and in deciding the rights of individuals it becomes a duty to scrutinize the acts of the public officers of France as minutely as we would those of our own government. To say then that other Indians from Canada and Louisiana were sent to be sold as slaves in St. Domingo is not sufficient. As much might have been said of the transportation and sale of the Natchez ; but the act was notorious ; the circumstances were generally known and by reason of the notoriety, we are enabled to form an opinion of its legality or illegality ; of the other it is not even said by what authority they were sent. It remains to enquire on this branch of the subject whether the practice of the French colonists is evidence of an implied assent of the government to permit them to hold Indians as slaves.

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We have turned to Europe and found slavery disappearing from that continent since the middle ages by the mere force and effect of public opinion, and that the most powerful and energetic government in that quarter of the world was unable, by a statutory provision, so far to overcome public opinion as to restore slavery, even in the persons of the most abandoned and profligate convicts. We have seen Spain making the most vigorous exertions to protect the native Americans from the violence of her lawless adventurers who conquered the new world for her, and only desisting when her efforts became useless, thereby protesting against the practice. We (560) have seen the highest Court of Virginia, where it was contended that the aborigines were allowed to be reduced to slavery without any express warrant of law, discharging from the bonds of slavery those whose ancestors had been for nearly one hundred years held in slavery, merely because they had proved a descent in the maternal line from an Indian woman; and even the advocates of the parties claiming to hold them as slaves not presuming to base the client's claim on any thing but the statutory law—counsel, too, whose reputation forbids one to entertain the idea that they were not profoundly versed in the history and laws of their country. We have the authority of Montesquieu for saying, that Louis XIII. was with difficulty prevailed on to pass a law to authorize his colonies to enslave the Africans. Consequently, as before observed, the Frenchman migrating to Louisiana carried with him no unwritten law to authorize the enslaving of the native Americans. Did then the crown of France, by a silent acquiescence, assent to the slavery of these persons? Mr. Justice Blackstone (63d page of the first vol. of his commentaries,) tells us that the monuments and evidences of the legal customs of England are contained in the Records of the several Courts of Justice, in books of reports and judicial decisions, and in the treatises of the learned sages of the profession, preserved and handed down to us from the highest antiquity.

The monuments and evidences of the Roman unwritten law, according to Mr. Butler, (see *Hora Jurisicæ Subsecivæ*, p. 43,) are the *Elitum Praetoris* and the *Responsa Prudentum*, which words, liberally translated, mean the decisions of the Praetors' Court, and the opinions of the learned sages of the profession, and it is fair to presume that in all enlightened countries similar rules prevail. The opinions and legal doctrines of the civilians, as well as those of the learned sages of the common law, were very highly respected: but till they were ratified by a judicial decision, they had no other weight than what they derived (says Butler) from the degree of public estimation in which the persons who delivered them were held. The evidence taken in this cause, and offered to prove the French law, is, that during the time the prov- (561) ince was subject to France, there were at Fort Chartres and elsewhere through the country, a great many Indian slaves and but few blacks. The Indians were universally acknowledged as slaves, and frequently sold as such before the Governor. The witness himself had sold several: one to the commandant, that he brought from Mississippi, and afterwards adds that the commandant he speaks of, was the English commandant at Kaskaskia; and from the case of Seville and Chretian, further evidence of the French law is offered. It is in the following words: "It appears from the depositions of a number of witnesses, (admitted by the parties to have been correctly taken and to be proper evidence in the cause,) that at the time the Spanish Government took possession of the country, viz., in 1769, many inhabitants of the colony held and possessed Indians as slaves, and it seems to have been a belief very general among them, that the practice of holding Indians in slavery, was tolerated

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and authorized by that government." It is here endeavored by the counsel for the appellee, to assimilate the sale before the commandant, to a judicial decision. We know as a matter of history, that under the Spanish rule, in Louisiana, a commandant was a military officer commanding at a post, such as Kaskaskia then was.

To this military officer, for a want of more intelligent person, a civil jurisdiction, about equal to that of a Justice of the Peace in our own State, was commonly entrusted. Even a judicial decision by such a person, after argument by able counsel, would be esteemed of very little weight. But the witness says he had seen sales of Indians made before the Governor; he himself had sold several, one to the commandant. This governor and commandant are probably one and the same person, but that is immaterial. In what part of this world is a judicial officer, immaterial what may be his grade or intelligence, bound to pry into the contracts of persons who buy and sell in his presence? Or rather, in what civilized country is he not bound by the rules of common sense to refrain from giving any opinion on the legality or illegality of such contracts? But this commandant or Governor was a (562) British officer, and, if we may judge of his rank by the importance of the post, as probably a non-commissioned officer, as a commissioned officer. That, however, is immaterial, for no one conversant with judicial proceedings, would suppose that either the one or the other was versed in the laws prevailing in Louisiana while it belonged to France. If the acts of ownership, done by the colonist in the presence of the Governor, were no evidence of a law authorizing such acts, there can surely be no reason why such acts done out of his presence should be evidence of such a law. The able counsel who argued the cases cited from the Virginia Reports, if such arguments as these be worth any thing, must have been very inattentive to their clients' interest not to have urged them. But there remains the testimony of the witnesses who testified that it was generally believed that the slavery of Indians was tolerated and authorized by the French government. We have seen that the evidences of the unwritten laws of England and Rome were the decisions of their Courts and the opinions of men learned in the laws, in the language of the civil lawyers, *Responsa Prudentum*. The opinions of such men, says Mr. Butler, were highly respected, but till they were ratified by a judicial decision, they had no other weight than what they derived from the degree of public estimation in which the persons who delivered them were held, the weakest evidence of the law hitherto recognized by law writers; but here we have the evidence of nameless witnesses mostly, and it is not even pretended that those who are named have any claims to law knowledge. As a blind man would not be received to testify concerning colors to a jury, or a deaf man concerning sound, so it seems reasonable that those who manifest by their discourse an utter ignorance of law, should not be received to prove it before a Court of law. It seems to be a wise rule to receive no lower evidence of the law than the treatises of the learned sages of the profession, or in the language of the civilians, "*Responsa Prudentum*." Such evidence of the general law of the land was, probably, never before the case of Seville and Chretian, offered in a Court of law, and had not the consequences of the decision in this cause been very important, it would not (563) have been deemed material to bestow so much attention on this matter. In the case of Seville and Chretian, we are also told that Governor O'Reilly, on taking possession of the colony in 1769, discovered that a considerable number of Indians were held in slavery by the French colonists. "This he declared by a proclamation to be contray to the wise and pious laws of Spain, but by the same instrument he

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confirmed the inhabitants in the possession of such Indian slaves until the pleasure of the King in this respect could be known. Here then, it is said, is an excellent recognition of the right of the possessors to hold their Indian slaves until the legislative will of the monarch should deprive them of it. In conformity with this opinion of Governor O'Reilly, it is said, is a decree of the Baron de Carondelet, twenty-five years after, in 1794, by which he orders Alexis and David to return to and abide with their owners until the Royal will was expressed to the contrary."

By the law of nations, the inhabitants of a ceded, and even of a conquered province, "retain their ancient municipal regulations, until they are abrogated by some act of the new Sovereign," and their property, too, until they forfeit it by some criminal act.

If then the French colonists had, under the French rule, a right to hold the Indians in slavery, they could not by the subsequent introduction of the laws of Spain be deprived of that right, and it would be unreasonable to suppose that any King of Spain who has sat on the Throne for the last three hundred years, would so far disregard public opinion as to attempt to give his laws a retrospective effect. If the Governor intended by his proclamation to quiet them on their claims, he did a very weak act in telling them that they held their Indian slaves in violation of the laws of Spain. For most certainly if they derived from the government of France no right to hold the Indians in slavery, he had no power to dispense with the laws of Spain which prohibited Indian slavery.

For more than two hundred years previous to that time, by the famous regulations (564) of Charles V. of which mention is made of the case of Seville and Chretian, Dr. Robertson says the high pretensions of the conquerors of the new world, who considered its inhabitants as slaves, to whose service they had acquired a full right of property, were finally abrogated. From that period to the present time, Indians have been respected as free men and entitled to the privilege of subjects. The historian tells us also, that all laws and ordinances relative to the police and government of the colonies, originated in the Royal Council of the Indies, and must be approved of by two-thirds of the members before they are issued in the name of the King. To that Council, each person employed in America, from the Viceroy downwards, is accountable. It reviews their conduct, rewards their services, and inflicts the punishment due their malversations: see Rob. Hist. Amer., B. 8. From the copy of this proclamation furnished by the counsel of the appellee, dated 7th Dec. 1769, it appears that the Governor forbade any person whatever to acquire any property in any Indian whatever. We find in it these remarkable words: "It is also ordained that the actual proprietors of said Indian slaves shall not dispose of those whom they hold, in any manner whatsoever, unless it be to give them their freedom. Awaiting the orders of his Majesty on this subject, we enjoin upon the said proprietors to go and make their declaration at the office of the Recorder, by giving the name and the nation of said Indians, and the price at which the proprietors shall value them," and the commandants of the several districts are commanded to make returns to the Clerk of the Cabildo at New Orleans, of all the Indians whose names shall be entered with the Recorders. O'Reilly probably intended to liberate them. He well knew that he had no authority to restrain the colonists from alienating property which they lawfully held when they came under the dominion of Spain. But O'Reilly was removed. The Court of Madrid, we are told, secretly disapproved the acts of outrage which he committed on taking possession of the colony. Six of the principal colonists had by his order been executed for their opposition to his

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(565) landing. Marbois hist. 138. Had not O'Reilly been removed from office, it is probable the will of the Monarch would have been made known to them in such manner as it is usually made known in civilized countries, not by a new law to make that unlawful which was before lawful, but through a ministerial officer to summon the holders of those Indian slaves to appear before some judicial tribunal, to show by what authority they were held in bondage. It is in no part of the proclamation intimated that the colonists should be confirmed in the possession of such Indian slaves until the pleasure of the King in this respect could be known. But they were commanded in the most positive manner, not to dispose of those whom they held in any manner whatsoever, unless it be to give them their freedom.

How this command not to dispose of their slaves in any manner whatsoever, unless it be to give them their freedom, could be construed into an express recognition by the Governor, of their right to hold their Indian slaves until the legislative will of the Monarch should deprive them of it, it is not easy to perceive. Again, who in modern days makes laws to deprive subjects of their property? To make this construction plausible, we were told in the argument of this cause, that although by the law of nations, the laws of a ceded province remained in force under the new rulers, yet the laws by which the province was governed might afterwards be changed, and their rights taken away; that the Spanish government was a despotism, and not bound to respect the rights of property in the subject. That the government of Spain is despotic, is perhaps what no writer of the laws of nations, or even historian has ever yet ventured to assert. We have seen on the authority of Dr. Robertson, that all laws and ordinances relative to the government and police of the colonies, originated in the Royal Council of the Indies, and must be approved of by two-thirds of the members before they are issued in the name of the King. To deprive a man of his property, is the act either of a Court of law acting in obedience to the law, the act of a trespasser, or the act of a robber, and not a legislative act. In the commencement of the sixteenth century, the son of Columbus sued Ferdinand the most powerful and unprincipled King who has sat on the throne of Spain for the last three centuries, in his own Court, and obtained a judgment against him on a contract between the King and his father, and also obtained what was due him. It cannot be denied that two hundred and sixty years after, when Europe is so much more enlightened, two-thirds of the Royal Council of the Indies would be so regardless of the rights of private persons and of the law of nations, as to approve of a law, the effect of which would be to deprive their fellow-subjects by its retrospective action, of property which they held under their ancient laws. Believing then that O'Reilly, as Spanish Governor of Louisiana, had no legislative power, and that the Crown of Spain would neither on the one hand so far change the regulations of Charles the V to give the inhabitants a right of property in the Indians which they had not derived from the laws of France, nor on the other so far violate its faith as to deprive new subjects of property which was lawfully acquired under their former government, it appears to us to be a forced construction of O'Reilly's proclamation to suppose that when he commanded the actual proprietors of Indian slaves not to dispose of them in any manner whatsoever, unless it be to give them their freedom, that he thereby designed to recognize "*the right of the possessors to hold their Indian slaves, until the legislative will of the Monarch should deprive them of it.*" The most probable construction of that proclamation seems to be, that O'Reilly, well knowing the colonists derived no right from the laws of France to hold the Indians in bondage,

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intended by a strict judicial investigation to ascertain those persons who were so held and therefore his orders were given that no proprietor should dispose of them, except to give them their freedom, and that an exact account of each should be taken and reported to the Clerk of the Cabildo, in order that he might have the means of making the proprietors liable for the safe deliverance of the Indians. The decree of the Baron de Carondelet remains to be considered. By this decree we are told that he, (567) twenty-five years after (the proclamation of O'Reilly,) "in 1794, ordered two Indians, Alexis and David, to return to and abide with their owners, until the Royal will was expressed to the contrary." Nothing of the character of a judicial decision is seen here. It is well known that legal proceedings in those countries in which the civil law prevails, are more formal than among us where the mode of proceeding is conformable to the principles of the common law. Had these persons sued for their freedom, it became the duty of the Court to decide whether they were free or not, and by its decree to order them to return to and abide with their owners, until the Royal will was expressed to the contrary. How was the Royal will to be expressed? The will of the Kings of Europe is expressed in judicial matters through their Courts of law.

The Kings of Europe, legislators and not executive officers, (*executeurs de la loi*) Princes and not Judges, have discharged themselves of that part of their authority which might be odious, and bestowing favors in their own persons, have committed to particular magistrates the distribution of punishments. See Montesqueu, *Grandeure et decadance des Romain*s, chap. 16. The only way to know the King's will judicially was by an appeal to a higher Court, and unless an appeal had been taken it was useless to tell them to wait till the King's will were known. For any thing appearing by this statement, there might have been no suit instituted. It might have been a mere tradition believed and current in New Orleans, and entitled to no more credit than the legal opinions of the number of nameless witnesses whose depositions (admitted by the parties to have been correctly taken and proper evidence in the cause) were read in the case cited. The history of Louisiana affords abundant evidence that the Crown of France did not feel less solicitude nor exert less industry to ameliorate the condition of the Indians of that province than the Crown of Spain did to ameliorate that of the Indians of South America. Du Pratz, and Marbois after him, attribute the blame of the Natchez war to the ill conduct of the French officers (568) and not to any plan or contrivance of the French government. Du Pratz devotes many pages of the third volume of his history to demonstrate what interest the Crown of France felt in maintaining a good understanding with the various tribes; and indeed what history of the French settlements in America can we read without learning the same thing? As in Spain there was a Royal Council of the Indies, so in France there was a company of the Indies formed in 1723. The Duke of Orleans was declared its Governor. Its privileges embraced Asia, Africa and America. In the deliberations of this association, composed of great noblemen and merchants, India, China, the Factories of Senegal and Barbary, the West Indies, and Canada, were, in turn, brought into view. Louisiana holds a principal place in these discussions. See Marbois, pp. 115 and 116. The French government did not then enter on the business of founding a great and powerful colony in Louisiana without a plan. A part of that plan as has been before said, on the authority of the same author, was to civilize the Indians. In a subsequent page (122) he tells us that in 1748, the Indians were beginning to recover from the hatred with which the French government

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had momentarily inspired them. The missionaries exerted themselves to make them christians, and labored with an admirable zeal to make them more humane. The Governors distributed to them cattle and instruments of tillage. It is true that those benevolent cares did not produce the desired effect, but the natives were grateful for them and the French were then able to scatter themselves among them without apprehension. They sometimes married Indian women, and were then incorporated into their tribes. The same author says, in another part of his work, (p. 136,) the Louisianians rendered an honorable homage to the memory of the Governor D'Abadie, whose death was occasioned by the grief he felt when he was instructed to make known the cession of the colony to Spain. The eulogy states that the Governor severely repressed the excesses of masters towards their slaves, that the Indians were also protected against every kind of oppression. Speaking of the provisions made (569) for them in the treaty of cession to the United States, the author says (p. 293) "the character of the Indians was well known to the negotiators. The efforts that had been, and the expenses that have been incurred for three centuries, have not effected any change in the habits of the tribes; but they obstinately avoid civilization. These tribes, always children, require to be paternally governed, they preferred the French to other nations, and willingly adopted them into their tribes."

Though they were ready to use freely whatever in our huts or houses suited their convenience, or to appropriate it to themselves, they were submissive to our orders. They were well inclined to render us services, and even as warriors to unite their arms to ours." The case of Seville and Chretian was relied on, not only because the decision was made by the highest Court of judicature in the State, and because the Judges were persons of great legal acquirements, but because of the peculiar advantages they enjoyed in the place where their sessions were held to acquire an accurate knowledge of the laws of France and of the decisions of the Courts of Spain; whence comes it then, that we have not a more accurate account of this decree (so called) of the Governor Carondelet, concerning David and Alexis? Or if there were any attempt made to ascertain the will of the King on that subject, (as the Governor is made to intimate there would be,) how does it happen that we hear nothing of a decision of the Royal Council of the Indies, in which Court alone the King is supposed to be present? and that presence too is as much a fiction of law, as the presence of a King of England in his Court of King's bench. If it be said that it was the business of the party against whom the decision was made to take, and prosecute the appeal, then it may be answered that it was no judicial decision for the Governor to order them to return to and abide with their former owners, until the Royal will was expressed to the contrary. For if the order or decree (as it is called) be any thing else than an indirect denial of justice, it means that he intended to relieve them of the trouble of prosecuting their appeal. It has been sufficiently demonstrated to (570) be inconsistent with the general practice of the European powers to suffer their subjects to enslave the natives of America; and it has also been shown that the policy of the Crown of France repels the idea that such a practice ever was contemplated by it. A French subject then, never could have enslaved an Indian, but by the express permission of his sovereign. We have seen that the register of the colonial regulations is now in existence in France, and if any such permission ever was granted, it is the duty of the person claiming the right to establish it by producing some better evidence than the conjectures of unknown persons who seem never to have entertained an idea of any other law than the arbitrary and capricious will of

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the petty magistrate of the little village where chance had located him. Tayon, the person who held the appellant's maternal ancestor in slavery at the time of the publication of the proclamation, according to the testimony of his daughter, having seen the proclamation, said that she would be free at his death. Another witness stated that he heard Tayon declare that she was free, and that she staid with him of her own accord. And the appellee's counsel took the trouble to bring in the register of Indian slaves made at Fort Chartres in obedience to an order made in the proclamation, by which it appeared that Tayon, then residing at that place, had not registered this woman. Whence it must necessarily be concluded that he did not regard her as his *Indian slave*, and that he declined registering her name, &c., as required by the proclamation under pretence that she never had been held in slavery. Were we disposed to multiply words, it might be easy to cite evidence from the depositions in this cause, that Indians never were considered slaves under the French government, and those witnesses too perhaps not more unlearned in the law, than those who deposed otherwise. Indeed one of the appellee's own witnesses, one too whose respectability and intelligence was well known in St. Louis, and who would not lose by a comparison with any of the ancient inhabitants found here by the American government (571) in March, 1804, (for the Court may travel out of a record to inquire after the value and credit of a legal authority,) this witness testified that the Spanish government declared Marie Louise, an Indian woman residing in the family of said Tayon, free, and that many Indians remained with their masters after they were so declared. This witness believed that the maternal ancestor of the appellant was a negro woman, and therefore remained a slave. But we know that the Spanish government declared none free. The Governor O'Reilly's proclamation was the only public act; those who knew they had no right to hold Indians in slavery, might well dismiss them as by the proclamation they were allowed to do, and thus avoid a judicial investigation in which they had nothing to gain and by which they might lose, so that if we were to resort to such loose evidence of the law as the testimony of witnesses who know nothing but by common rumor, the appellee gains nothing. But perhaps too much has already been said on this subject. The decision of this cause is, however, important in its consequences, and in deciding contrary to the opinion of the highest Court of judicature of a sister State, we have the misfortune not to be able to concur all in the same opinion.

It is the opinion of a majority of this Court, that the Circuit Court erred in giving to the jury the first and third instructions above mentioned. The majority of the Court is further of opinion that the Circuit Court erred in so much of the second instruction as related to the descendants of an Indian woman in the maternal line; that is to say, the Circuit Court erred in instructing the jury that if they found the maternal ancestor of the plaintiff was an Indian woman, and that she was held as a slave in the province of Louisiana while it was held by the French, she and her descendants ought to be taken by the jury to have been lawfully slaves. In the second instruction there is no other error committed. For the reasons aforesaid, the judgment of the Circuit Court is reversed. This cause was first argued before this Court at the May term of the year 1828. This Court being then composed of two Judges only, the decision of the Circuit Court was affirmed by a division in opinion of the (572) two Judges then sitting: at the October term of the year 1833, the parties by their counsel appeared in this Court, and mutually agreed that the judgment in this cause before rendered in this Court should be set aside, and that it should be again

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argued before the Court, consisting of all the Judges. The judgment of the Circuit Court being now reversed, two of the Judges concurring in opinion, the cause is remanded to that Court, and it is required to proceed therein in conformity with this opinion.

WASH, J., dissenting.

I dissent from the foregoing opinion of the court. The re-argument, with further research and reflection have but served to confirm the opinion I entertained on the first hearing of this cause. I shall not attempt a minute examination of the various questions which have been raised; the statement of them is full in the opinion delivered, and I will content myself with the outlines of the views then taken and which now lead me to a different conclusion from that to which the Court have come. From the most authentic histories, sacred and profane, ancient and modern, we learn that slavery in a more or less absolute state, has existed in all ages and nations since the deluge. That no condition, color, age or sex has ever been considered exempt from "the bitter curse." That whilst the treatment and condition of slaves have been very different in different nations at the same period, and in the same nation at different periods of its existence, varying according to notions of policy or of natural rights; yet, that slaves have been always esteemed, and are at this day esteemed, the proper goods or property of their masters or owners, and to be sold, exchanged or bartered, as merchandize or other property, real or personal. It would be equally difficult and unprofitable to attempt to trace the origin of slavery, as to the time or manner of its introduction among the different nations of the earth. In looking to the civil law (from which France and Spain derive their system of jurisprudence,) we find it asserted by *Justinian I*, 155 that "Jure gentium servi nostri sunt, qui ab hostibus capiuntur," this was doubtless the most fruitful origin of slavery. It was regarded as the settled law of nations, that prisoners of war should be reduced to the condition of slaves. It was so practised upon by the Jews, Egyptians, Assyrians, Greeks and Romans—was so recognized and practised upon by the nations who overturned the Roman empire, and has been so recognized and practised upon by most if not by all of the nations of modern Europe. To say that nature, enlightened humanity and the pure principles of christianity, cry out against slavery, is to talk not only without authority, but directly in the face of authority. Greece and Rome at the periods of their greatest learning and refinement, when at the height of their power and splendor, were then most remarkable for the number of their slaves and for the absolute dominion claimed and exercised over them. It is out and out, from beginning to end, a pure question of power, individually, all men have equal rights to life, liberty and property. In communities or Governments, mere brute force or the physical strength of the majority as it is called, abridges or annihilates these rights at pleasure, what the despot or the despotic will of the majority, through any other medium, decrees or permits, becomes the law of the land, and cannot be resisted upon any other principle than that of rebellion, which assumes that the majority have, or soon will, or ought to revoke or change their decree, &c. Every independent nation or organized community judges for itself, and its judgment is final between those who belong to the nation or community and cannot be interfered with by others, without affording just cause of war, if the injured party may choose to think itself able to redress the wrong in that way. In monarchical governments the

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will of the monarch or of the majority is to be collected from what is permitted or tolerated, rather than from any express orders or decrees.

It is also a principle of the civil law, that slavery may begin by a voluntary surrender of liberty; and that by the law of nature, children born of parents who are de facto slaves become ipso facto slaves themselves, "quia nascuntur servi" among (574) the Greeks and Romans from whom we borrow much of our boasted learning and refinement, a debtor unable to pay his debts, became the slave of his creditor; and criminals were sold to slavery or condemned to the oar. The Germans according to Tacitus, were so addicted to gaming, that when they parted with every thing else, they would often stake their liberty and their persons; and the losers would become the voluntary slaves of the winners and be sold or exchanged away in commerce like other merchandize or property. I shall not attempt to note the great improvement made in modern times in these matters. It is certain that France and Spain have both asserted the right to enslave and hold in slavery. The property in a slave is to be placed upon the same footing, and to be lost, acquired or enjoyed, subject only to such municipal laws or regulations, as each nation may provide or prescribe for itself. The capture of the Iroquois chiefs by the French in Canada, see *Raynal* 48, and their reduction to slavery and the massacre in 1730, of the greater part of the Natchez nation and reduction of the residue to slavery, were as distinctly the acts of the French Government as if a royal proclamation had preceded or approved the deed. The evidence derived from the old archives of the country—the registers of baptisms and burials—the records of voluntary sales, and of the sales and distributions made of the estates of intestates, with the clear and positive testimony of witnesses sworn in this cause, exhibit beyond doubt or question, numerous cases of Indian slavery, commencing with the earliest settlement of the colony, and continuing after the period when the Spaniards assumed the government in 1769. The proclamation of O'Reilly, at the time the government was assumed by the Spaniards in 1769, and the decree of the Baron de Carondelet, in 1794, are proof to the same effect, and show expressly that the existence of Indian slavery de facto, was not only known to, but tolerated by the Spanish Government. The case of Seville and Chretian, cited from *3rd Martin's Reports*, was decided by very able Judges, and puts the question, as I think, upon its true (575) ground. It is clear from the testimony in the cause, that the grandmother of the plaintiff was a woman of the Natchez tribe of Indians, taken a prisoner at the time that nation was massacred, captured and exterminated by Perier in 1730. Du Pratz and Marbois both state that the Natchez had acted in a manner so savage and perfidious as to make it necessary, in the estimation of the French General, Perier, to exterminate them. They had indiscriminately murdered or reduced to slavery such of the French as fell into their hands, and upon the settled principles of the law of nations, might have been all put to the sword or rightfully reduced to slavery. The laws of nations, however, have never been regarded as applicable to the Indian tribes or nations of this continent. With them the general practice in war is to give no quarter, and whenever prisoners are taken they become the individual property of those who capture them, and are either sold, adopted into their families, or held at their mercy.

All of the Natchez nation then, who were not put to death but were captured, were therefore rightly reduced to slavery. Du Pratz informs us that those who escaped the massacre, (with the exception of a few who fled to the Chickasaws,) were

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all made slaves, and "that shortly afterwards those slaves were embarked for the Island of St. Domingo, in order that the nation should become extinct in the colony;" much stress has been laid on this statement of Du Pratz for two purposes, first, as evidencing a determination on the part of the French Government not to enslave Indians in the province of Louisiana, and second, to show that the maternal ancestor of the plaintiff could not have been one of those captured and enslaved. The main object of the historian was to state the fact that the Natchez nation was exterminated and the causes which led to it, and it was not so material to state the precise means or manner of doing the thing. If such were not the case, however, the evidence in the cause is abundant to show, that the historical account of the matter as given by Du Pratz is not accurate, and that the maternal ancestor of the plaintiff was one of those captured at the time of the massacre, and was not sent to St. Domingo, or if so, was (576) brought back and held in slavery in the province of Louisiana. Independent of the direct proof in the cause, the account given by Marbois in his history of Louisiana, of the destruction of the Natchez nation, is well calculated to sustain this view, he says, p. 119, "the Governor of the colony conceived that the insurrection (of the Natchez) required that a great example should be made; and the tribe was exterminated with the exception of a few families who escaped the general massacre and were protected by the neighboring tribes. From time immemorial, the Natchez had been governed by a family of chiefs whom they believed to be the children of the Sun. General Perier, the commanding officer, had them all carried away and transported to Cape François—the most important member of the dynasty died there a few months after his arrival. The other Suns were maintained by the company for the moderate sum of 1,888 livres 7 sous. The company applied to M. Maupeps to defray this expense. On the 22d April, 1731, the Minister wrote to the directors as follows: 'I am not aware that there is any other course to adopt in this matter than to order the survivors of these two Indian families to be sold or sent back to Louisiana.' The registers of the company contain the following resolution: 'It was resolved, to order the sale of the survivors of the said two families of Natchez Indians.'" Here the minister, whose duty it was to make known the will of the Sovereign, suggests the propriety of selling the Indians, and the company to whom the colony had been transferred by letters patent, and who had charge of its settlement and government, in accordance with the suggestion, proceeded to sell the survivors as slaves. What recognition could be more full and explicit? The slavery in this particular case was expressly sanctioned and legalized, and it need not be contended that the general practice or policy of the French in the American Colonies was to enslave the Indians; yet it seems to me that the proof is sufficient to establish such practice and that too, with the full and clear knowledge and recognition of the Government. To regard the question then, as one to be settled by the laws (577) which were in force prior to 1769, when Spain took possession of Louisiana, I can feel no doubt, and the practice is shown to have been pursued and recognized by the Spaniards, under neither of the governments that have preceded us, could the plaintiff have asserted successfully her claim to freedom. As property held and enjoyed by the permission and consent of the French and Spanish governments, it is contended, and I think rightly, that the owners of such Indian slaves, are secured and protected as well by the law of nations as by the express stipulations of the treaty of cession to the United States.

WILSON v. TIERNAN.

A justice of the Peace cannot issue a Sci. Fa. on a judgment obtained before another justice, to show cause why execution should not issue.

ERROR from the Washington Circuit Court.

WASH, J., delivered the opinion of the Court.

Tiernan, the defendant in error, made application to the Circuit Court for a writ of prohibition to be directed to one John Trimble, a Justice of the Peace for the County of Washington, commanding him to forbear issuing an execution on a certain judgment rendered by him against said Tiernan, in favor of said Wilson, which was granted accordingly; to the granting of which writ Wilson objected and excepted to the opinion of the Court, and now seeks to reverse the same in this Court. The facts as they are stated in the bill of exceptions are, that on the 13th of November, 1824, Wilson obtained judgment against Tiernan before George McGahan, a Justice of the Peace for the County of St. Francois, for the sum of \$13 92. Afterwards in July, 1825, upon a transcript of said judgment, Wilson sued Tiernan before Henry Shurlds, a Justice of the Peace for Washington County, and had judgment and execution, on which a part of the money was made. And again in November, 1833, (578) Wilson obtained a second transcript of the judgment from the docket of Justice McGahan, and on this transcript last obtained, the aforesaid Justice Trimble issued a *scire facias* against the defendant in error, to show cause why execution should not issue against him, and on the failure of the defendant to show cause, said Justice awarded execution for the debt specified in the transcript with interest and costs; and to prevent the Justice from issuing execution accordingly, Tiernan applied to the Circuit Court for the writ of prohibition as aforesaid. For the plaintiff in error it is insisted, that the Justice of the Peace had jurisdiction of the subject matter and that the Circuit Court had no power to grant the prohibition. Other points have been raised on both sides, but this is the only question that we deem material to consider, and on this we think the law is clearly with the appellee.

A stronger case for the exercise of the superintending control given by the Constitution (to the Circuit Courts over Justices of the Peace,) could hardly have occurred. The Justice might just as well have issued a death warrant as a *scire facias* against Tiernan, so far as the law is concerned. The process was utterly null and void and gave no jurisdiction either of the person or subject matter. The Circuit Court therefore, very properly restrained the Justice from proceeding farther, and its judgment is affirmed.

CAMPBELL AND MOORE v. RUSSELL.

It is not a good assignment of a breach of warranty that the land belonged to the United States at the time the warranty was made.

ERROR to St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Campbell and Moore, executors of James Byrnside, brought their action of covenant in the Circuit Court against Russell, and judgment being there given against them, they bring their cause into this Court to reverse the judgment. Russell, by his deed, sold and conveyed to Byrnside, testator of the plaintiffs, four hundred arpens of land, and by said deed covenanted to warrant the title to said laid land against all claims, to Byrnside, his heirs and assigns. On this deed the executors bring their action, and among other breaches assign this, that the land sold as aforesaid by Russell, belonged to the United States at the time when it was sold, and that the U. States had aliened that land to persons who had entered on it. The defendant pleaded fifteen pleas, and the plaintiff demurred to the 3d, 10th, 11th, 12th and 15th. The defendant contends that the declaration is bad. The third plea is non infregit conventionem, the tenth that the cause of action did not arise within ten years. Both these pleas are bad. The 11th and 12th pleas are in substance the same, to-wit: That the representatives of Byrnside assented to the entry of the persons to whom the United States aliened; both these pleas are believed to be good. The 15th plea is that Byrnside had by will devised the land to two of his sons. This plea is thought to be bad. The demurrsers then, to the 3d, 10th and 15th pleas, were, we believe, rightly sustained, and those to the 11th and 12th ought to have been overruled.

It being our opinion that it is not a sufficient assignment of the breach of warranty that the land at the time of the execution of the deed belonged to the United States, and that there are other breaches in the declaration well assigned, and the judgment of the Circuit Court against the plaintiffs being general, its judgment is therefore reversed, the cause is remanded.

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BAILEY, ADMINISTRATOR, &c., v. ORMSBY.

1. After the Court has on motion of a party excluded written evidence from a jury, that party has no right to submit it to the jury and then to require the Court to exclude it a second time.
2. It is error for a Court to tell a jury to find as they think proper upon the evidence. (Note a.)
3. An administrator may sue under the act to simplify proceedings at law.

APPEAL from Pulaski Circuit Court.**TOMPKINS J.**, delivered the opinion of the Court.

Baily sued Ormsby in the Circuit Court and now appeals to this Court to reverse the judgment given for him in that Court. This action was commenced under the act simplifying proceedings at law. The petition is as follows: Abraham R. Bailey, administrator of the estate of John Sullens, deceased; plaintiff states that he holds a note on the defendant, Henry F. Ormsby, in substance as followeth: On or before the first day of March, 1833, I promise to pay John Sullens forty-two thousand three hundred and thirty-three and two-thirds feet of merchantable inch and a quarter pine plank, witness my hand this 18th Feb., 1830, (signed). Yet the said debt remains unpaid, wherefore he prays judgment for his debt, and damages for the detention thereof, together with costs, and the said plaintiff brings here into Court his letters of administration upon the estate of the said John Sullens, deceased. The defendant pleaded the general issue and payment. Issues were made up on both pleas, and on the finding of the jury, a judgment was rendered in favor of the plaintiff for \$42 88. The testimony saved is, that the plank was worth senty-five cents per hundred, and that a demand was proved. The defendant then proved that before the death of Sullens a settlement took place between him and the deceased; the witness stated that it was at the house of the defendant, in Gasconade county, and that he understood that Sullens held a note or notes of the defendant to a considerable amount, that the same were at the house of Sullens, and that the defendant paid Sullens, (581) at that time, three hundred or three hundred and fifty dollars, which was to be credited on the said note or notes, by Sullens on his arrival at home. The witness understood from the conversation of Sullens and Ormsby at the same time, that by previous agreement betwixt the parties, the defendant had taken up certain promissory notes executed by said Sullens to different individuals, and that the notes so taken up constituted the said payment, and that it was in consideration "of said Ormsby having purchased said notes, that the said Sullens then and there agreed to make and give the credit as aforesaid." The defendant then offered in evidence certain notes, but failing to prove that they were the same spoken of by the witness before mentioned, the Court on motion of the plaintiff's counsel excluded them. The jury retired to consider of their verdict, and after some time returned into Court with a verdict of three hundred dollars for the defendant, which they explained to mean that the defendant was entitled to a credit on the note sued on for that amount, on account of the notes offered in evidence as aforesaid. The plaintiff's counsel, observing that

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those notes did not amount to three hundred dollars, requested that they might be "sent with the jury to give credit from," which the counsel for the defendant consented to. The plaintiff then moved the Court to instruct the jury that they could allow the defendant no credit on account of the said last mentioned notes so sent out with them. The Court refused to give the instruction, and instructed the jury to find as they thought right upon the evidence. The refusal of the Court to give the instruction prayed and the instruction given by the Court were excepted to, and the plaintiff moved for a new trial, assigning for cause that the verdict was against the instruction of the Court, and that the Court mis-instructed the jury. It is assigned for error, that the Court refused to grant the new trial. The testimony of the defendant as explained by the witness is, that he heard a conversation in the lifetime of the intestate between him and the defendant, in which it was admitted by Sullens, the intestate, that the defendant had taken up the amount, or thereabouts, of three hundred dollars⁽⁵⁸²⁾ of notes executed by Sullens to different individuals at his request, for which he said he would give a credit on the defendant's note when he arrived at home. This was not done, and the defendant not being able to prove that the notes he offered in evidence to establish the amount of credit he claimed, were those which he had been promised a credit for, the Court excluded them from the jury, and very properly.

It was the plaintiff's own fault to send them afterwards to the jury in order to ascertain the amount which the jury seemed determined to find against him. It is not easy to perceive any right the plaintiff's counsel had to trouble the Court to give the same instruction to the jury a second time. It was his own act to make the instruction necessary a second time, an act too for which there seems to have been no necessity. But the Court clearly committed error in instructing the jury to find as they thought right upon the evidence.

By this instruction the first instruction so correctly given, viz: not to regard those notes as evidence, was virtually withdrawn. The plaintiff ought to have had a new trial allowed him, for the verdict was against the instruction first given, and the Court also mis-instructed the jury in telling them to find as they thought right upon the evidence; but it is contended that the judgment ought not to be reversed, although error may have been committed by the Court. For the plaintiff had brought his action wrong in this, that he sued as administrator and had not shown himself as administrator by authority of the State of Missouri, and that he had sued for plank, and that it could hardly be intended for the Court to give a judgment against the defendant for plank to be paid in kind. The form of the petition given in the statute, certainly does not suit the case of a person suing as administrator. The statute, however, seems intended for general use, and it does not seem necessary to pursue the form of the petition given in it, except when that form suits the cause.

The language of the statute is, "*purporting as follows,*" No reason is seen why with proper averments the petition might not be adapted to the case of an administrator suing, nor is it seen why the administrator, should his cause be remanded, might not amend and rectify all the defects of the petition as they now exist. This Court, then, being of opinion that the Circuit Court committed error in not allowing a new trial, reverse its judgment, and remand the cause for further proceedings in conformity with this opinion.

(a) See *Barker v. Pool*, 6 Mo. R., p. 260.

CARTER v. BLANKENSHIP.

In an action of assumpsit—plea set-off—replication thereto that the plaintiff did not owe, &c.—finding of the jury thereon, “that the plaintiff did not undertake and promise, &c.” The informality of the finding is not error.

APPEAL from Pulaski Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of assumpsit brought by Blankenship against Carter, in which there was a judgment for Blankenship, to reverse which Carter prosecutes this appeal. The declaration contains nine counts, all of them stating that the appellee sold to the appellant an improvement on public land; for which it is alledged in the first count, that the appellant promises to deliver to the appellee four rafts of plank; in the others, that he promised to deliver four rafts of plank with the privilege of substituting a horse for one of them; the pleas are non-assumpsit and set-off replication, &c. The jury found that the defendant did undertake and promise in manner and form, &c., and that the plaintiff did not undertake and promise, &c. On the trial the plaintiff proved the sale of the improvement to the defendant, and that the defendant promised to deliver to him four rafts of plank valued at \$400, reserving to himself the privilege of paying a horse instead of one of the rafts of plank; the defendant proved a tender of the horse and a refusal by the plaintiff; the defendant (584) offered too to read in evidence a transcript of the record of a suit in the Crawford Circuit Court, for the purpose of showing a former recovery for the same cause of action. This transcript was rejected by the Court, and this rejection being excepted to, is assigned for error. The cause of action set out in the third count of the declaration in the record, the transcript of which was offered in evidence, is the same as that set out in the first count of the declaration in the cause now before this Court. The pleas filed in the cause, the transcript of which was offered in evidence were,

First. Non-assumpsit, on which issue was taken.

Second. Payment, which was traversed and issue joined.

Third. A plea of set-off and issue joined.

The jury found that the plaintiff was indebted to the defendant in the sum of \$32 75; the other issues were not found, and no judgment was entered on the finding of the jury. Had the jury found the issues joined on the first and second pleas for the defendant, the question might have been raised whether a verdict on which no judgment is rendered, might be given in evidence between the same parties in another cause to bar the second action. The transcript offered in evidence, then seems to have been rejected with propriety; for nothing is found on it that can have any bearing on this cause in favor of the defendant. It seems to be altogether irrelevant.

It was also assigned for error, that the issue taken on the second plea was not found. The second plea was, as has been stated, a plea of set-off, to which the plaintiff replied he did not owe, &c. The action was in form assumpsit. The

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matters pleaded as a set-off might have been declared for in assumpsit. The undertaking and promising is the legal conclusion drawn from the indebtedness of the party indebted. The objection to the finding of the jury, viz: that the plaintiff did not undertake and promise, &c., seems to be merely a formal objection. We are therefore of opinion that there is no error either in the rejection of the transcript offered in evidence, nor in the finding of the jury on the issue made on the second plea. We therefore are of opinion that the judgment of the Circuit Court ought to be affirmed, and it is accordingly affirmed.

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LABERGE v. McCAusLAND, ADM'R.

1. An administrator with the will annexed may sue for a breach of covenant made to the testator to convey land.
2. Such administrator ought in his declaration to state a request made to the covenantor to convey the land to the individual person or persons to whom it belongs, whether it be devised or descend to the heir at law. (Note a.)

ERROR to St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

McCausland, administrator of Christopher M. Price, sued Laberge in the Circuit Court, and there had judgment by default. To reverse that judgment, Laberge prosecutes this writ of error. It is stated in the declaration that Joseph Laberge by his deed covenanted and promised that he and Salla his wife, should and would at any time thereafter, when thereunto requested, make, sign, seal and deliver to the said Price or to his heirs or assigns, or to such other persons as he or they might request, a good general warranty deed, in fee simple, for a certain tract or parcel of land, &c.; and it is assigned as a breach of the covenant, that Price being dead, the administrator requested Laberge to make to Price's legal representatives, a deed such as is set out in the covenant, and to cause the same to be executed by his wife. It is assigned for error, that the declaration is bad, and that the administrator had no right of action.

Our statute (see *Revised Code*, p. 106, sec. 40) makes real estate subject to the payment of the debts of the deceased. The 38th section of the act concerning executors and administrators, authorizes the Probate Court to order the executor or administrator on application of any person interested, to complete the payments on lands which the deceased in his life time may have purchased and not paid for, and provides that land thus acquired may be disposed of as other real estate of the deceased. Many persons may have an interest in the lands of an intestate under our

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laws. Thence it becomes necessary as well as convenient, that some person should (586) be designated by the statute to take charge of them, and to sue and recover on contracts for the conveyance of such lands. No person can be better suited for that purpose than the administrator, whether the object be to obtain a conveyance, or damages for a breach of contract. We are inclined to think that the action was well brought by the administrator. But we are not of opinion that a sufficient request was stated in the declaration.

The administrator with the will annexed, as in this case, ought to be able to point out to whom the land ought to be conveyed, whether it be devised or descend to the heir at law, and should have requested the defendant (appellant) to convey to the proper persons. It would seem too that it should have been stated in the declaration to whom the promise to make, &c., the deed was made. We are of opinion that the declaration is bad, and therefore the judgment is reversed and the cause remanded to the Circuit Court, to be proceeded in conformably to this opinion.

(a.) See Keatly v. McLaugherty, 4 Mo. R., p. 221.

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MYERS v. MILLER.

If one of the makers of a joint note reside in the State of New York at the time of making the note, the assignee cannot maintain his action against the assignor before he sues the makers, unless he show that the suit would have been unavailing in New York.

ERROR to St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of assumpsit brought by Miller against Myers, in the St. Louis Circuit Court, to recover the amount of a promissory note made by Peter W. and Robert McQueen, and endorsed by Myers. Peter McQueen lived in New York, and Robert in St. Louis, at the time the note was given. They were partners in conducting the business of a foundry in St. Louis, and it appeared that the firm in St. Louis (587) had not effects in Missouri sufficient to satisfy the demands against it, but that the partner in New York had property, and that Robert had some property in Illinois, the value of which is not shown. On the trial in the Circuit Court the cause was referred to Auditors, and the Court instructed them that if the firm in St. Louis was so far insolvent that a suit in Missouri would be unavailing, the plaintiff was entitled to recover against the endorser, although one of the makers of the note had property in New York where he resided. Under this instruction the Auditors found

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for the plaintiff, and judgment was entered up accordingly; to reverse which, Myers prosecutes his writ of error in this Court. Several questions have been raised; the only one we shall consider, grows out of the instruction given by the Circuit Court to the Auditors, upon the above statement of facts. And it seems to us clear that the Court erred in giving this instruction. The partners might have had no effects in Missouri, and yet have been rich. It seems that one of them resided in New York at the time the note was given, where he continued to reside in the possession of considerable property.

The endorsee must be presumed to have known and trusted to the condition of the makers at the time it was endorsed, since he was required in the first instance to use due diligence to obtain the money of them before he could call upon the endorser. It should at least have been shown that the makers were insolvent and unable to pay their debts generally, or that suits prosecuted in New York and Missouri, where the makers resided at the time of making the note, and continued to reside when it became due, would have been unavailing. The judgment of the Circuit Court must therefore be reversed, with costs.

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HAY v. DUNKY.

Contracts entered into with negroes and mulattoes in Illinois, under the act of 1807, are not rendered obligatory by the Constitution of that State.

ON APPEAL from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action brought by Dunky, the appellee, against Hay, the appellant, in the St. Louis Circuit Court, to recover her freedom. On the trial in the Circuit Court Dunky obtained a verdict and judgment, from which Hay appealed to this Court. The declaration is in common form under the statute authorizing suits to be instituted for the trial of the right to freedom. The defendant pleaded three pleas.

First. Not guilty.

Second. That the plaintiff was a slave.

And third. That the plaintiff was held to labor in the State of Illinois, and had escaped to Missouri at the time of the alledged trespass; with a special traverse in the two last pleas, of the plaintiff's right to freedom.

Issues were joined on these pleas, and on the trial it was proved that the plaintiff, about the year 1811, was brought by the agent of William Morrison from the State of Virginia to Kaskaskias in the State of Illinois, and was held as a slave by Morrison, in the Territory and State of Illinois. On the part of the defendant it was

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proved, that the plaintiff was held in servitude in the State of Illinois, and that before the commencement of this action, she came to this State without the consent of the person claiming her services in Illinois; and that before the commencement of this suit, the defendant arrested the plaintiff in Missouri, for the purpose of removing her to Illinois, as the agent of the person who claimed her services there, and that the defendant exercised over the plaintiff no other control in Missouri than was necessary for such removal. The defendant then gave in evidence a statute law of the Territory of Illinois, passed on the 17th of September, 1807, being an act entitled "An (589) Act concerning the introduction of negroes and mulattoes into this Territory." The first section of the act authorizes the owners or purchasers of slaves in any of the States or Territories of the United States, to bring them into Illinois. The second section provides, that "the owner or possessor of any negroes or mulattoes, as aforesaid, and bringing the same into this Territory, shall within thirty days after such removal, go with the same before the Clerk of the Court of Common Pleas of the proper county, and in the presence of the said Clerk, the said owner or possessor shall determine and agree to and with his or her negro or mulatto, upon the term of years which the said negro or mulatto will and shall serve his or her said owner or possessor, and the said Clerk is hereby authorized and required to make a record thereof in a book which he shall keep for that purpose." The third section provides for the removal of such negro or mulatto as shall refuse to serve his or her owner as aforesaid, into any other State or Territory within sixty days after such refusal, &c. The fifth section of the act provides, that where the negro or mulatto so introduced into the Territory as aforesaid, shall be under the age of fifteen years, it shall be lawful for the owner or possessor to hold said negro or mulatto to service, the male until he shall arrive at the age of thirty-five, and the female to the age of thirty-two years. The sixth section provides, that "any person removing any negro or mulatto into this Territory under the authority of the preceding sections, it shall be incumbent on such person within thirty days thereafter, to register the name and age of such negro or mulatto with the Clerk of the Court of Common Pleas, for the proper county." The other sections provide penalties for neglect, &c., and need not be noticed. The defendant then gave in evidence a copy of the record of registry in Illinois, made up in tabular form, and showing that the plaintiff, in November, 1811, (she being then 16 years old,) was indentured to William Morrison to serve forty years. Upon this state of facts, the Court instructed the jury that if they believed from the evidence, that the plaintiff in this cause was registered in the Territory of Illinois as an (590) indentured servant in the year 1811, in pursuance of the act of the Legislature given in evidence in this case, for a period not yet expired, and that she came into this State without the consent of the person claiming her services in Illinois, and that the defendant exercised no authority over her in this State, except what was necessary to remove her into Illinois, for the person claiming her services there, they must find for the defendant. The Court also instructed the jury, that the copy of the record of registry given in evidence in this case, establishes the agreement on the part of the plaintiff to serve William Morrison for the period in that copy mentioned, in pursuance of the laws of the Territory of Illinois. The jury found a verdict for the plaintiff, which the defendant moved to have set aside and a new trial granted, for the following reasons:

- First. Because the verdict is against the evidence.
- Second. Because the verdict is without evidence.

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Third. Because the verdict is against law.

And fourth. Because the verdict is against the instructions of the Court.

The motion for a new trial was overruled, and the opinion of the Court thereon excepted to, and is now assigned for error.

For the appellant it is insisted, first, that the plaintiff was rightfully held to labor in the State of Illinois at the time of commencing this suit. In support of this position, the appellant's counsel relies on the third section of the sixth article of the Illinois State Constitution, which provides, that "each and every person who has been bound to service by contract or indenture in virtue of the laws of the Illinois Territory heretofore existing, and in conformity to the provisions of the same, without fraud or collusion, shall be held to a specific performance of their contracts or indentures; and such negroes and mulattoes as have been registered in conformity with the aforesaid laws, shall serve out the time appointed by said laws, &c." And then it is insisted that if by the laws of Illinois, the plaintiff was held to labor there, she cannot be discharged in any other State into which she (591) escapes from Illinois, and the counsel for the appellant cites the third clause of the 2d section of the 4th article of the Constitution of the United States, which provides, that "no person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due;" and lastly, it is insisted that the copy of the record of registry given in evidence in this case, proves the fact that the plaintiff was held to service or labor in the State of Illinois, agreeably to the provisions of the above recited act of the Territorial Legislature of 1807, the proceedings under which being effectual in Illinois, were according to the provisions of the 1st section of the 4th article of the Constitution of the United States, and the 3d section of the 56th chapter of the acts of Congress of 1804, to be regarded as of equal force and effect in Missouri, &c. On the other side it is insisted for the appellee, that the motion for a new trial was properly overruled, because the first instruction given by the Court was hypothetical, and left the jury free to pass upon the validity of the defense set up in evidence, and the second instruction given by the Court was, that the copy of the registry offered was evidence of an agreement by the plaintiff to serve the defendant, not that it was in conformity to any law of the Territory of Illinois, or imposed any obligation to serve by contract or indenture.

Secondly. That the instructions given by the Court were both wrong, because the act of 1807 was in fraud and violation of the ordinance of 1787, and a regular indenture under it would have been null and void, and because the registry under the fraudulent act did not amount to a contract or indenture, as therein provided for.

Thirdly. That the 6th article of the Constitution of the State of Illinois, relied on by the appellant, does not apply to the case before the Court; or if it can be construed as applying to such a registry as was proved in this case, then, that this provision of the Constitution is illegal and void, &c. The ordinance of 1787, above referred to, provided in clear and express terms, that there should be neither slavery (592) nor involuntary servitude within the Territory ceded by Virginia to the United States, of which Illinois formed a part, and it is manifest that the act of the Territorial Legislature of 1807, referred to, was in violation of that provision of the ordinance. It has been so decided by the Supreme Court of the State of Illinois, and is a matter conceded by the appellant's counsel. Indeed, it seems strange that amongst

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sensible and honest men, any doubt could ever have arisen. Yet is contended that the 6th art. of the Illinois constitution recognized the act of the Territorial Legislature of 1807, and legalized the qualified slavery or servitude provided for or imposed by that act. Upon principles of constitutional law, it may for the present be conceded, that if such was the object of the convention in framing the article referred to, the rights secured under it to the citizens of Illinois, cannot be defeated or legally interfered with, by the tribunals of any other State; but that persons held to service or labor in Illinois, under the 6th art. of their constitution, and escaping into Missouri, or any other State, ought to be delivered up on claim of the party to whom such service or labor may be due. See 3d clause of the 2d sec. 4th art. of Const. U. S. This Court is prepared to go further on this point than the Supreme Court of Illinois have gone, and we hold that it was competent for the convention in forming a State Government for Illinois, not only to have legalized the act of the Territorial Legislature of 1807, but to have provided for the introduction and existence of unconditional or absolute slavery. Such is now the sovereign right of every State in the Union. Illinois in becoming a State, became at once the equal in all claims to sovereignty to any and every other State. The right to hold slaves "is out and out from beginning to end a pure question of power. Individually, all men have equal rights to life, liberty and property. In communities or governments, mere brute force or the physical strength of the majority (as it is called,) abridges or annihilates these rights at pleasure. What the despot or the despotic will of the majority, through any other medium, decrees or permits, becomes the law of the land, and cannot be resisted by the members of such communities or government, upon any other principle than that of rebellion, which assumes that the majority have changed, or soon will, or ought to revoke or change their decrees, &c. Every independent nation or organized community judges for itself, and its judgment is final between those who belong to such nation or community, and cannot be interfered with by other governments or communities, without affording just cause of war, if the party injured may choose to think itself able to redress the wrong in that way." Conceding then, that the convention had full power to legalize the slavery provided for in the act of the Territorial Legislature referred to, the next question to be considered is, have they done so? The language made use of in the constitution is not very clear, and would justify the belief, "that more was meant than meets the eye." The first clause or member of the sentence provides that "each and every person who has been bound to service by contract or indenture, in virtue of the laws of the Illinois Territory heretofore existing, and in conformity to the provisions of the same, without fraud or collusion, shall be held to a specific performance of their contracts or indentures." This is a general provision, with reference to all contracts, by all persons, bond or free, under the general laws in force in the Territory. It applies to indentures of apprentices and such other contracts for service, as had been legally executed by persons capable of contracting by virtue of the laws in force in the Territory.

If it had been intended to apply to contracts and indentures entered into by negroes and mulattoes, under the act of the Territorial Legislature of 1807, it has failed of its object, and the provision is inoperative through repugnancy. Such contracts or indentures were in fraud and violation of the ordinance, and therefore could not have been reached and classed with contracts and indentures entered into, "without fraud or collusion," as described and referred to in this clause of the 6th art.

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The second clause or member of the sentence above recited from the 6th article, as if taking up a new subject, provides, "and such negroes and mulattoes as have been (594) registered in conformity with the aforesaid laws, shall serve out the time appointed by said law." Under this provision the counsel for the appellant insists, that the right of Morrison to the services of Dunky, is confirmed, and that the Constitution of the United States, (art. 4, sec. 2 and 3,) protects and secures him in the enforcement of that right. The 6th section of the act of the Territorial Legislature of 1807, above cited, requires that all negroes and mulattoes shall be registered, when introduced under that act, but does not appoint or fix the time or term for which they are to serve; and it is only in the 5th section of the act that any time is fixed or appointed, and that in reference to such negroes and mulattoes only, as are under the age of fifteen years at the time of their removal into the Territory, and upon these and these only can this second clause (of the 3d sec. of the 6th art.) have any operation, all others were to serve according to their indentures, and the time of service was fixed by their indentures and not appointed by the laws. The record shows that the plaintiff in this case was over fifteen. This view of the matter makes it unnecessary to examine particularly the other questions raised in the argument of the cause. The judgment of the Circuit Court is affirmed with costs.

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BLOCK AND WIFE, AND KELLY AND WIFE v. BLOCK ET AL.

If the testator declare by his last will and testament, that one of his children shall take no part of his estate, this is a good provision under the statute for such child, and the testator shall not be deemed to have died intestate as to such child.

ERROR to St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

Moses Block and others brought a petition for partition of two lots of ground in (595) St. Louis, against Phineas Block and wife, et al. The petition sets out the respective rights of the parties, and shows that they claim as devisees of Simon Block, and that in and by the will of said Simon, he mentions the name of Delia Block, the wife of said Phineas, and expressly declares, that she shall have nothing; then he goes on to devise all his real estate to his wife and children. Phineas Block and Delia his wife, appear to the petition, and answer and insist, that Simon Block as to her died intestate, and that she is entitled to an equal portion with the other children. On the hearing of the petition, the Court decreed that the said Delia was not entitled to take any thing, she being excluded by her father's will; and this is

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the only question made in the case. By the 20th section of the act respecting wills and testaments, (*Revised Code 795,*) it is enacted, "that if any person shall make his last will and testament, and die leaving a child or children, or their descendants, not provided for in such will, although such child or children be born after the death of the testator, every such testator, so far as shall regard any such child or children, or their descendants not provided for as aforesaid, shall be deemed to die intestate, and such child, &c., shall be entitled to such proportion of the estate of the testator, real and personal, as if he had actually died intestate, and the same shall be assigned, &c." Upon this state of law and fact, Mr. Bates for the plaintiffs in error, insists, that the meaning of this 20th section is, that the testator shall make a beneficial devise or legacy, and that to mention the name of a child, and declare that child shall have nothing is no provision. On the other side it is argued by Mr. Allen for the defendants, that the intention and meaning of the act is, that when the child is forgotten, then he shall have a share; but that when he is mentioned in the will and excluded, that is a provision within the intent of the section. We are of opinion this latter construction is right. By the first section of the act, all persons except, &c., of sound and disposing mind, are enabled to devise real and personal estate to whomsoever they please, and by the 24th sec. it is enacted, "that all Courts and others concerned in the execution of last wills and testaments, shall have due regard to the direction of the will and the true intent and meaning of the testator, in all matters and things that shall be brought before them concerning the same." In this case the intent of the testator is clear and explicit, that the daughter Delia shall have nothing. How can the Court obey this 24th section and at the same time declare that the daughter shall have a full share? This notion that every child must have some legacy or the will is bad, is not of common law origin. Blackstone says the notion of the civil law was, that if a person made a will and disinherited a child, that he was deficient in duty and the will was bad, but also says such notion has no foundation in the common law, 2 Bl. Com. 503. In 1815, the Legislature of the Territory of Missouri enacted, that when a person shall make a will and testament and omits to mention the name of any child, or shall afterwards marry, or have a child not provided for in such will, such testator, so far as regards such child, shall be deemed to die intestate. This provision was taken literally from an act passed by the Governor and Judges in 1807. In this act of 1815, we see the Legislature put the case expressly on the ground the testator forgot the child, for they say, if he omits to mention the name of such child, then, &c., why mention the name.

The answer is, because that shows the child was not forgotten. If his name were only mentioned for the purpose of disinheriting him, yet he would be obliged to abide by it. What shows more clearly that *not provided for* in that act is intended to be only synonymous with forgotten and omitted is, that in the same sentence in which they mention omit, they say, or after making the will "shall marry or have a child not provided for," then such child shall have distribution as if he had made no will. Such was the law, and we think its undoubted meaning in 1825, when it was repealed by the present statute on the subject. We assume it as a proposition undeniable, that up to that time the principle of our law was, that when the testator forgot a child, such child should have distribution, and that he could not have it when he was mentioned in the will, but only mentioned for the purpose of disinheriting him. In January, 1825, the Legislature saw fit to take up this same subject again, and have made a new enactment, in words only, as we conceive. The act says, "if any per-

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son shall make his or her last will and testament, and die leaving a child or children, or the descendants of any such child or children not provided for in such will, although such child or children be born after the death of the testator, every such testator so far as shall regard such child, shall be deemed to die intestate, &c." There, it is believed, no new principle is introduced; not provided for, are the words used in forensic parlance, we use provision in this sense, where a thing is totally omitted by a statute, we say it is not provided for, and the Legislature often use the expression as provided for by an act concerning, &c., and when we look at the act we see things there relating to the subject in the negative and affirmative, yet we say the thing is provided for. In this case there is a negative provision, that the daughter shall have nothing. We are aware that the mere form of expression is against the meaning we give to the sentence. To provide for means to take care of before hand; but the Legislature hardly meant to establish the doctrine that a testator could not devise his property to whom he might think fit, as they seem to have declared he might do in the first section of the act; and by the 24th section the true intent of the testator is to govern in all things; now here this intent is clear, and it is at least doubtful what is really meant by the 20th section. Then this clear intent must prevail over a dubious sentence in the law, as to what the testator may or may not do. There are many cases in the law books where the Courts, on a view of the whole statute, have gone against the express words of a statute to carry into effect the intent of the Legislature; and no better illustration can be given of such cases than to examine the case at bar. Suppose in this case the testator had given the daughter 25 cents, this would be a provision. Did the Legislature then intend that each child should have something? How much better would be her condition with 25 cents, than what is, when it is declared she shall have nothing, is not hard to determine. (598) If this is not what the Legislature did mean, then did they mean each child should have an equal share? They have nowhere said so in this act respecting wills, or in any other act; if they had intended this, would they have used the words they did use? In cases of intestacy, where the property is equally divided among children, quite other language is used; or did they mean that when a child might for cause or without cause, happen to be the object of its father's displeasure, the father, although he declared the child should have nothing, yet the child should have an equal portion of his estate. If they meant this, the means used to show this meaning are very weak. Suppose a case, where a testator has only one child, and he declares such child shall have nothing, and then devises all to B, a stranger. Now the law is, as shown above, that a person may, by the 1st sec. of this act, devise to whom he pleases, for no restraint is laid on the devising power, and the law is, that the true intent of the testator shall be carried into effect, (see 24th sec. of the act,) the will is, that B shall have it, yet the construction contended for by counsel, will give the whole to the child. Bacon says, one rule for construing statutes is, to suppose one's self the law maker, and then let the question be stated, did you mean this? Then such answer as a sensible and moderately well informed man would give, will be the quotient or answer to the proposition. If we try the case put above by this rule, the answer will be by the law maker, that such was not his intention. From the foregoing arguments, we conclude that the true meaning of the words *not provided for*, is, that if the testator has forgotten or overlooked any child, he shall, notwithstanding such accident, be let in to have a share. The judgment of the Circuit Court is affirmed.

Block and Kelly v. Block et al.

TOMPKINS, J., dissenting.

Moses Block and others, filed their petition in the Circuit Court of St. Louis county, praying that certain lots lying in the city of St. Louis, might be divided among themselves and others, children of Simon Block, deceased, in equal parts according to the (599) last will of the deceased; by which will Delia, the wife of said Phineas Block, was expressly excluded from having any part of the estate of the deceased. Phineas Block and Delia, his wife, answered, admitting the facts stated in the petition, but contending that Delia, the wife of Phineas and one of the children of the deceased, not being provided for in the last will and testament of the deceased, and not having had an equal part of the testator's estate in his lifetime, was entitled to an equal portion of the estate of the testator with the other children of the deceased. The Circuit Court decided against the claim of Phineas Block and his wife; and to reverse this judgment they bring the cause into this Court by writ of error.

The words of the statute are, "that if any person shall make his or her last will and testament, and die leaving a child or children, or the descendants of any child or children, (in case of their death,) not provided for in such will, although such child or children be born after the death of the testator, every such testator so far as shall regard such child or children, or their descendants, shall be deemed to die intestate, and such child or children, or their descendants, shall be entitled to such portion of the estate of the testator, real and personal, as if he or she had actually died intestate; and the same shall be assigned to him, her or them, accordingly; and all the other legatees, devisees and heirs, shall refund their average or proportional part; provided that such child or children, or their descendants, so claiming, shall not have had an equal portion of the testator's estate bestowed on him, her or them, in the testator's lifetime by way of advancement." *Rev. Code*, p. 795.

On the part of the plaintiffs in error it is contended, that the provision required by the act to be made in the testator's will for the child, must be something substantial, that it is a mere evasion to say that it is provided in the will that the child shall have nothing. On the part of the defendants in error it is contended, that the terms used in the act must either mean that each child must have an equal part of the father's estate, or he must be allowed to cut the child off by merely naming it in the will and refusing to give him any thing, or a sum merely nominal. For it is said no one (600) can tell what will be proper and suitable provision, so much do the world differ in opinion about this matter; all, too, must be accommodated to the value of the estate of the deceased. It is insisted also, that this construction of the above recited section of the act concerning wills and testaments, (section 20,) is supported by the 24th section of the same act. *Rev. Code*, p. 796. This section is in these words: "That all Courts and others concerned in the execution of last wills and testaments, shall have due regard to the directions of the will, and the true intent and meaning of the testator in all matters and things that shall be brought before them concerning the same;" but the previous section (20th) required the testator to provide for his child, unless he would have it provided for by the law; and as far as he obeyed the law, his will was to be construed under the 24th section and no farther. We are left then where we began, and the question still remains, what is the provision which the act requires a father to make for his child? If the act required no more at the hand of the testator than that he should name the child in his will, then the old law would have been more intelligible. The old law was this, "when any person shall make his or her last will and testament and omits to mention the name of any child

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or children, if living, or the legal representatives of such child or children," &c. See *Laws Mo. Ter.*, December session, 1814, p. 131, or *Geyer's Digest*, p. 431. Here language is used, of the meaning of which no doubt can be entertained. Why change the phraseology if no change of meaning was intended? Or can it be supposed that a Legislature which required a master to maintain and support his manumitted infant slaves, (see *Rev. Code*, p. 744,) intended to permit the same man, or indeed any other, to cast his infant children on the charity of the community. Vanity and pride may find great difficulty in settling a provision proper to be made by a rich and unnatural father for his child; but if it ever should happen, under the construction of the law contended for by the defendants in error, that such a parent cast his children on the world, the County Courts will be compelled to ascertain how (601) much of the county funds will be required for such purpose. I find no difficulty in so construing the law, as to compel an unnatural father to make a comfortable provision for his children, and still to allow him to provide more liberally for such as either needed or merited a more liberal provision. For instance, if a man's fortune were moderate and he died leaving many children, some young and unable to work, and others grown up and educated, it would not in many cases be improper to say that those grown up and educated were already provided for, as he might have expended on their education as much as would be left to the younger and weaker, or in the language of the said 20th section, they already had an equal portion of the testator's estate bestowed upon them by way of advancement. But did no evil exist under the old law to remedy which, a change in the law might have been necessary? With some few exceptions our statutes make a very good-will for those who neglect to make one for themselves. But in most of the cases where men die, leaving a will and children by two wives, it may be safely asserted that the children of the first wife are left unprovided for, and under the construction of the statute here contended for by the defendants, will continue to be left unprovided for, unless indeed it be a provision to mention his name in the will by way of reminding him that an unnatural father had remembered in his last moments to leave the last token of unkindness. This is no small evil. Personal property is the favorite of the State. Our legislative bodies, in spite of preconceived prejudices, have been compelled to allow executors and administrators in many cases to sell real property to pay debts, and to retain the personal. (See *Rev. Code*, p. 107.) Married women are allowed with certain formalities to sell the lands that descend to them, and when the father dies intestate, in almost every instance the land is sold on application to the Circuit Court, because the quantity is so small that it cannot be divided in kind, without great prejudice to the owners. (See *Rev. Code*, c. p. 611, sec. 4.) Thus the real estate of the wife becomes personal estate and vested absolutely in the husband. Even if a Court of (602) Chancery could pursue the money thus raised, and treat it as real property and keep it for the wife's use, the cost of suits would in many cases amount to as much as the principal. The property then of the first wife, whether it be real or personal, becomes generally the absolute property of the husband; he marries a second, or perhaps a third wife, and the children of the last wife take the whole. The cases of those who may be reduced to want are those which a legislative body might reasonably be supposed to contemplate with most anxiety. Our institutions, republican in their character, do not seek to extend the empire of the father over the child beyond the age of twenty-one years. If he wish it he must acquire such empire by gentle means. Had the Legislature wished to enable the father to hold the power

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here contended for, as a rod over an undutiful child, nothing could have been easier than to copy the old law into the Revised Code; as the statute is now worded I cannot but conclude that great violence is done to language when this construction is put upon the words "not provided for." In my opinion the judgment of the Circuit Court ought to be reversed.

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An attorney cannot be suspended or stricken from the roll upon its being "proven to the Circuit Court that he had passed counterfeit notes, knowing them to be counterfeit; and that being indicted therefor and confined in the common jail, he made his escape therefrom."

ORDER of Suspension of an Attorney at Law by the Circuit Court of St. Louis County.

TOMPKINS, J., delivered the opinion of the Court.

Foreman, on motion of the Circuit Attorney, was suspended from practice as an attorney and counsellor at law of the Circuit Court of St. Louis county, and a copy of the order of suspension in compliance with the law has been sent to this Court. (603) (See section 7th of the act concerning attorneys and counsellors at law, *Rev. Code*, p. 159.) The section referred to gives to the Circuit Court the power to suspend for any misconduct, which in the opinion of the Court is sufficient to justify his being stricken from the rolls. By the 6th section of the same act, the Supreme Court has power to strike from the rolls any attorney who shall have been convicted of felony, or guilty of improperly retaining his clients' money after demand made by the client for the same, mal-practice in his office, gross ignorance or neglect of duty, or contempt of Court. The charge against Foreman as set out in the order of the Circuit Court is, that it was proved to the Court that he had passed counterfeit notes knowing them to be such, and that being indicted for the offence aforesaid, and confined in the common jail of the county of St. Louis, he made his escape therefrom. It is the opinion of this Court that the offence with which Foreman is charged is not any one of those enumerated in the 6th section above referred to, and the power to strike from the rolls for such cause not being given, this Court cannot exercise it. The cause is therefore remanded to the said Circuit Court, and that Court is required to dissolve the said suspension.

M'GIRK, C. J., dissenting.

My opinion is that causes of dismissal exist independent of the statute, and may be inquired into beyond its provisions.

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Decisions of the Supreme Court of Missouri,

JACKSON DISTRICT, SEPTEMBER TERM, 1834.

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POSEY v. BUCKNER.

1. In proceeding by attachment, the affidavit required by our statute may be made before a Justice of the Peace of another State. In such case the official character of the Justice sufficiently appears, by the Clerk of the County Court where he resides certifying that he was then an acting Justice duly commissioned, &c., and two of the commissioners of the same Court certifying that the person is Clerk and his official acts entitled to due faith and credit.
2. If a non-resident fails to give security for costs before action brought, he may be allowed to give it even after a motion made to dismiss for that cause. (Note a.)
3. A non-resident may have an attachment in this State against a non-resident.
4. In an attachment where the defendant demurs, the demurrer must be disposed of, before judgment can be given against the defendant. If not disposed of, it is error.
5. If the Circuit Court improperly awards execution, the party complaining must first move that Court to set aside the execution, before it can be assigned for error in the Supreme Court.

ERROR to the Circuit Court of Cape Girardeau county.

TOMPKINS, J., delivered the opinion of the Court.

Posey brought his action in the Circuit Court against Buckner, and in that Court obtained judgment and execution. To reverse that judgment, Buckner prosecutes his writ of error.

Posey and Buckner were both non-residents of this State, and the mode of proceeding was by attachment against the property of Buckner in this State. The affidavit required by our statute to be filed before the writ of attachment can be issued, was made before a Justice of the Peace for Gallatin county, in the State of Illinois, and the Clerk of the County Court certifies, that he was then an acting Justice duly commissioned, &c., and two of the commissioners of that County Court certify, that

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the person giving the certificate is Clerk, and that his official acts are entitled to due faith and credit.

(605) The Sheriff returned that he had executed the writ on Greer W. Davis, by attaching all the interest of the said Nicholas Buckner, in the hands of the said Davis, as executor of Alexander Buckner, deceased, in money. The defendant also demurred to the declaration of the plaintiff. The errors assigned and material to be noticed, are,

First. That the Circuit Court refused to dismiss the suit and quash the attachment, on the defendant's motion to that effect, for want of a sufficient affidavit to authorize the issuing of the same.

Second. For not dismissing the suit on motion, for the failure of the plaintiff to file a bond before the commencement of the suit, to secure the payment of costs, on the ground of his being a non-resident.

Third. That one non-resident cannot obtain an attachment against another.

Fourth. That the Court gave judgment against the defendant, without first disposing of the demurrer.

Fifth. That the Court gave judgment and ordered execution generally against the goods and chattels, lands and tenements, and body of the defendant.

First. In the case of Hays v. Bouthalier, vol. 1, p. 347, of *Missouri Decisions*, it was decided that an affidavit, such as the present, was sufficient to authorize the Circuit Court to issue an attachment.

Second. In the case of the Governor v. Rector, same vol., p. 638, it was decided that after a motion to dismiss a suit is made for want of security for cost, such security may then be given.

The provision for costs in that case was made by the 22d section, in this by the first section of the act concerning costs, passed January, 1825. In the opinion then delivered, both sections are reviewed, and it was the opinion of the Court, that in each case provided for by the two sections, security for costs might be given after motion to dismiss for want thereof; no reason is seen why that opinion should be overruled.

Third. No reason is seen why the writ of attachment should be restricted to residents. The first section of the act of 1825, giving the remedy by attachment, (see *Digest*, p. 144,) gives it in all cases where any creditor, or creditors shall file or cause to be filed, &c.

Fourth. By the second section of the act supplementary to the act to provide a method of proceeding against absent and absconding debtors, passed 17th Jan., 1831, (see p. 10,) the defendant may appear and plead without giving bail or entering into any bond. The Circuit Court should then have disposed of the demurrer.

Fifth. By the 7th section of the act of August, 1825, (see *Digest*, p. 147,) when the defendant fails to appear, judgment shall be entered as usual; but execution shall only go against the property attached. No motion was made in the Circuit Court to set aside the execution. It is useless to say, then, any thing on the subject.

It is assigned also for error that the Circuit Court gave compound interest; nothing appears to us to induce a belief that such interest was given. Inasmuch then as it appears that the Circuit Court did not dispose of the defendant's demurrer to the declaration, its judgment is reversed, and this cause is remanded for further proceedings in conformity with this opinion.

(a.) See Snowden v. McDaniel, 7 Mo. R., p. 313.

